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IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
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October Term, 1986

No. _____

VICKIE LORENE ROCK.....Petitioner

vs.

STATE OF ARKANSAS.....Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF ARKANSAS

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v.
STATE OF ARKANSAS

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Vicki Lorene Rock, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Arkansas entered in the above-entitled case on April 21, 1986.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Arkansas is reported at 288 Ark. 566 and at 708 S.W.2d 78 and is printed in Appendix A hereto, infra, page i. The entry of judgment of the Circuit Court of Benton County, Arkansas, is printed in Appendix A hereto, infra, page xvi. The pre-trial order of the Circuit Court is printed in Appendix A hereto, infra, page xvii.

JURISDICTION

The judgment of the Supreme Court of the State of Arkansas was entered on April 21, 1986. A timely petition for rehearing was denied on May 27, 1986. The jurisdiction of the Supreme Court is invoked under 28 USCS §1257.

QUESTIONS PRESENTED

1. Whether Arkansas's rule of per se inadmissibility of hypnotically refreshed recollection violates due process of law when applied against a defendant in a criminal case whose defense necessarily depended on the recollection of and testimony concerning certain actions not remembered prior to the hypnotically induced refreshing of recol-

lection.

2. Given the constitutionality of limiting a defendant's testimony as to post-hypnotic remembrance, then whether the order of the trial court was unconstitutionally broad, thereby being too restrictive of defendant's testimony, resulting in a denial of due process of law.

3. Given the constitutionality of the limitation of a defendant's testimony with respect to post-hypnotic remembrances, then whether the trial court erred in making arbitrary and inconsistent applications of the rule, which resulted in a denial of due process of law.

STATUTE INVOLVED

Constitution of the United States

Amendment 14

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

On July 2, 1983, Frank Rock died from a gunshot wound he received while trying to prevent his wife from leaving their apartment to get a hamburger. His wife, petitioner Vicki Lorene Rock was charged with manslaughter in connection with the death of her husband. Petitioner employed W.B. Putman, an able and experienced trial attorney, as lead counsel in the case. As petitioner could not recall important details regarding the gun discharging, at the suggestion of and through the arrangements by Mr. Putman, she submitted to hypnosis by Dr. Bettye Back, a licensed neuropsychologist, trained in the field of hypnosis, for the purpose of refreshing her memory. As a result of the second hypnotic session, petitioner was later able to recall that she did not put her finger on the trigger of the gun, and that the gun discharged completely by accident or mechanical failure of the safety as her husband grabbed her hand during the scuffle.

The prosecution made a pre-trial motion to exclude the petitioner's

testimony at the trial. A separate out-of-court hearing was held on the prosecution's motion, and at the conclusion of the hearing, the prosecution's motion was granted, and petitioner was ordered not to testify to any facts on the day of the shooting except "matters remembered and stated to the examiner prior to being placed under hypnosis." That hearing took place on November 26, 1984.

The trial began on December 4, 1984, and on December 6, 1984, the Court was advised of an irregularity in the jury. After a hearing in chambers where one juror was found to be impliedly biased, and upon motion by the state and by defendant, the Court declared a mistrial and reset a new trial for February 6, 1985. Six days later, on December 12, 1984, the lead defense counsel, Mr. W.B. Putman, died. The lead of petitioner's defense was assumed by Mr. Putman's partner, E.E. Maglothin, Jr., and his widow, Esther White, and the trial was recommenced on February 6, 1985.

During direct examination, the trial judge limited petitioner's testimony regarding the shooting to those statements contained in the psychologist's notes made immediately prior to the hypnosis. Petitioner was not permitted to relate to the jury the facts recalled after hypnosis or the facts previously remembered but not contained in the psychologist's notes. With the approval of the trial court, petitioner was examined directly from a copy of the psychologist's notes made prior to hypnosis, that procedure being apparently most consistent with the pre-trial order entered December 7, 1984.

Petitioner was convicted by the jury and sentenced by the Court to the maximum punishment allowed for the offense under Arkansas law. Petitioner appealed to the Supreme Court of Arkansas, and in the notice of appeal and designation of record, petitioner designated the entire record, "including but not limited to, all pleadings, motions, orders, exhibits, evidence and documents introduced or offered into evidence, instruction accepted, rejected and/or given, the proceedings and a transcription of the entire proceedings had in the trial Court in the above styled cause, excluding only Voir Dire, Opening Statement and Closing Arguments made to the jury by counsel." A transcription was made by the court reporter and lodged with the Supreme Court of Arkansas with the exception that the pre-trial hearing on the prosecution's motion to limit the petitioner's testimony was not included as part of the transcript. The Supreme Court of

Arkansas did not have before it the transcript of the extended hearing and testimony of the neuropsychologist.

The brief for petitioner made no attempt to correct or fill in the record pursuant to Rule 6(d) of the Rules of Appellate Procedure. No objection to the incompleteness of the transcript was made by the Attorney General nor was any attempt made to abstract that omitted portion of the transcript. By an opinion delivered April 21, 1986, the judgment of the trial court was affirmed without mention of the missing portion of the transcript. Timely petition for a rehearing was denied on May 27, 1986, again without mention of the omitted portion of the transcript either by counsel or by the Court. The pre-trial order of the trial court was included in the transcript and was abstracted on appeal.

The points raised here were specifically raised in a brief submitted to the trial court on October 22, 1984, prior to the entry of the order in question on December 7, 1984, and again in petitioner's brief to the Supreme Court of the State of Arkansas. The failure to transcribe the hearing upon which the restrictive order was based is noted here for the first time.

REASONS FOR GRANTING WRIT

The question of whether or not a criminal defendant may constitutionally have a right to testify limited because of a pre-trial hypnotic session or limited in the fashion done by the trial court in the instant case, appears to be a question not previously decided by the Court. In view of the increased use of hypnosis, both for pre-trial preparation by the defense and for witness identification and pre-trial preparation by the prosecution, the issue appears to be a matter of significant constitutional importance.

Petitioner's argument is threefold. First, the restriction on petitioner's right to testify as ordered in the case results in an unconstitutional limitation on petitioner's right to prepare her defense with her attorney, and her right to testify in the course of the trial as guaranteed by the due process clause of the Fourteenth Amendment. Second, assuming arguendo that some limitation may constitutionally be placed on a defendant's right to testify, then the limitation by the trial judge in the instant case to matters stated to and recorded by the hypnotist is too restrictive to be consistent with due process of law. Third, the proceedings against petitioner have lacked procedural due process

as a whole, taking into account all of the circumstances of the application of the pre-trial order of the Court during the trial of the cause and the decision on appeal.

The undisputed testimony of the psychologist in this case was that the purpose of the hypnosis session with petioner was for refreshing petitioner's memory, for the assistance of petitioner's attorney in understanding the case, and for trial preparation (Tr.pp.916-917). It would seem clear that the application of the trial court's restriction would have a far-reaching and adverse effect on a criminal defendant's right to effective counsel and to the proper preparation of his case, both of which are fundamental rights under the due process clause. *Glasser v. United States*, 315 U.S. 60 (1942). The right to counsel is clearly not perfunctory and includes the right to prepare. *In re Oliver*, 333 U.S. 257, (1948). It is certainly not a right of the state to have the defendant's testimony remain in the same form or be limited to what he recalled prior to meaningful consultation with his attorney. In practice, much of the time of the criminal trial attorney is spent reviewing facts with the defendant in order to see that details previously forgotten are remembered, and that defendant's recollection or version of the facts is presented not only correctly, but in a manner understandable to the trier of facts so that the defendant is not likely to be misunderstood or his testimony or recollection misconstrued. The correct trial preparation of a witness to testify is indeed an affirmative obligation of the attorney. The trial judge's decision in this case has the effect of saying to the defense attorney that if he uses certain methods for memory refreshment for the defendant, he may run the risk of preventing his client from testifying at all. The same argument used against hypnosis for memory recollection could be used against other schools of psychiatry or psychology which attempt to either improve or refresh a witness's memory without the use of hypnosis.

The principal objection to allowing peitioner to testify seems to be that after hypnosis she would invent memory rather than refresh what she really had, or that she cannot be cross-examined effectively because of the expertise of the hypnotist in some way shielding her mind from the rigors of cross-examination. Both of these aspects of the state's objection to the peitioner's testimony were dealt with in two classic writings on evidence.

In *Basic Problems of Evidence*, Edmund M. Morgan noted that a refreshment of recollection may be done in a number of ways, sometimes even by calling the attention of the witness to something that has no logical connection with the litigation, but most frequently by a writing, and that the danger of a writing is that the witness may substitute the contents of a writing for actual memory. In noting that to allow the trial judge to determine if the device of refreshing recollection is merely a subterfuge, Professor Morgan suggested that "Except in the most obvious cases, the memorandum will be used and the opponent's protection will lie only in cross examination. It must be said that in such situations intelligent cross-examination will usually easily disclose whether the witness is relying upon his present memory or upon the memorandum." Morgan, *Basic Problems of Evidence* (A.L.I.,1962), p. 62. Surely the same principal applies here. The danger to the testimony is the same; surely, in the context of due process, the test of intelligent cross-examination is a better means of dealing with invention of testimony under the guise of refreshing recollection than prohibiting the testimony.

The second aspect of the state's postion assumes that the hypnotist will not be a true expert, that through his expertise the hypnotist will improperly protect the witness from himself and make him cross-examination proof. This argument of course assumes an untruthful and devious hypnotist. The bias of experts is a long standing problem. As Professor Morgan pointed out: "The abuse of expert opinion evidence in modern litigation in criminal prosecutions ... has become in many states a scandal, for the expert witness has become in truth an advocate for the party who presents him, rather than as a witness." Morgan, *Practical Difficulties Impeding Reform in the Law of Evidence*, 14 Vand. L. Rev. 725 (1961). In the instant case, the testimony of an "expert" from the state medical examiners office clearly fell within that category when he changed his opinion after a lunch time conference with the prosecuting attorney. Yet no thought would be given to keeping the testimony out. In fact, the trial court allowed the state to reopen its case after resting to permit the change of testimony. Effective cross-examination is considered the remedy. Can a licensed, practicing psychologist be held to be more suspect than a chemist employed full time and paid by state law enforcement agencies? In this aspect, the ruling lacks basic

fairness.

Without the information developed by the use of hypnosis on petitioner, the defense attorneys would never have known the safety device and trigger were defective and that the gun discharged without her pulling the trigger. The information was the basis for having certain tests done, which in turn led to expert testimony which proved very conclusively that the gun was susceptible of being discharged without pulling the trigger. These characteristics of the gun were not discovered and would not have been meaningful without the recollected memory It is submitted that petitioner as a matter of right was entitled not only to get the information to the jury that the gun could discharge without her having pulled the trigger, but that in fact she believed that such was the case.

Allowing the petitioner to testify consistent with her memory at the time of the trial in no way jeopardizes the state's right to have the trier of fact weigh that testimony. The prosecutor is always free to show, for example, that the defendant may have made prior inconsistent statements; he can inquire as to the qualifications and ability of the professional who conducted the hypnotic session and to vigorously cross-examine the defendant to determine the sincerity of the belief. Petitioner submits that all of that is a fair part of due process. But to limit petitioner in what testimony she may give as a result of the hypnotic session constitutes a denial of her right to testify in her own defense. She was innocent of the crime and was literally unable to tell the jury the most direct reason why she was innocent, that her finger was never on the trigger.

Petitioner submits that this limitation on her right to testify in her own defense falls squarely within the doctrine that a state evidentiary rule may not constitutionally be applied so as to render a defendant's trial unfair. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

The applicable cases are scant. The case relied upon most heavily by the Arkansas Supreme Court, in answering the constitutional argument is *State v. Atwood*, 39 Conn. Sup. 273, 479 A.2d 259 (Conn.Super.1984). That case was a published opinion of the trial court dealing with a pre-trial motion by the defendant. The defendant claimed amnesia of the events surrounding the murder of his wife and moved that the court issue a pre-trial ruling on the admissibility of his testimony, should he decide to testify after under-

going hypnotism or sodium amytal interview designed to refresh his memory. After finding that defendant had not met his burden of proof in establishing amnesia, the court went on to discuss the issue of hypnosis and only in the final few paragraphs deals with the constitutional issue.

The trial court in *Atwood* rested its entire constitutional decision on *Greenfield v. Robinson*, 413 F.Supp. 1113 (W.D.Va.1976). But the trial court in *Atwood* apparently misunderstood the issue in *Greenfield v. Robinson*, supra. The *Atwood* court incorrectly noted that in Greenfield "the court held that the refusal to permit the defendant to testify *after* hypnosis did not infringe upon his right to due process." (emphasis added) 479 A.2d at 266. A reading of *Greenfield* indicates that the issues involved in *Greenfield* were substantially different from the issue envisioned by the *Atwood* court. Greenfield filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Virginia, alleging among other things that he had been denied due process of law because the trial court refused and the Virginia Supreme Court upheld the refusal to permit defendant to testify while in a hypnotic trance and also refused to permit the defendant's expert witness to testify concerning statements the defendant made to him while in a hypnotic trance. The District Court noted that there was not much evidence to suggest that defendant would testify to anything of any substantial value to the case, and that what would be added would be otherwise completely uncorroborated. The Court then stated that under those peculiar circumstances, Greenfield's due process guarantees were not abrogated by the trial court's refusal to permit Greenfield to relate his story under hypnosis or an expert witness to recount what the defendant told him while under hypnosis.

In the instant cause there is very substantial evidence to corroborate what the defendant said as a result of the hypnotic session, namely that her finger was not on the trigger of the gun, and that the gun discharged accidentally. Expert testimony established that not only was that version quite possible (taking into account the weapon and its peculiar characteristics), but that it was indeed likely to discharge accidentally.

The order of the trial judge in the instant case went far beyond the ruling of the trial judge in *Greenfield*. Indeed, there was nothing

in Arkansas law to forewarn petitioner that her entire testimony would be at risk by submitting herself to hypnosis, and presumably if no notes had been taken by the hypnotist prior to the hypnotic session then none of her testimony would have been admissable, because that was what the trial court limited petitioner's testimony to. Because of persistent objections by the prosecuting attorney during the direct examination of the petitioner, which were seemingly upheld by the trial court, defense counsel was compelled to read his questions to petitioner at the trial from the hypnotist's notes.

To summarize the course of events from the point of view of Vicki Rock, she was represented by W.B. Putman, an extremely capable and experienced trial lawyer, and at his suggestion, underwent a hypnotic session with an experienced, well-educated, and highly respected psychologist. At the conslusion of that session, she found herself unable to give her testimony beyond the notes written by the psychologist, notes which the psychologist did not intend to be complete or comprehensive. By setting the scope of the petitioner's testimony according to the psychologist's notes, the Arkansas Supreme Court has given the psychologist a role in the criminal process without any due process safeguards.

Because of the increased use of hypnosis, both by law enforcement agencies and by defense attorneys, petitioner submits that the issue is one of increasing importance to the legal community. There are no Court of Appeals opinions dealing with the subject, and the Arkansas Supreme Court decision in the instant case appears to be the only case which deals squarely with a defendant's constitutional right to testify after submission to hypnosis.

Petitioner submits that even assuming constitutionality of the basic Arkansas evidentiary rule that a defendant's testimony may be so limited, then it is clear that the particular order applied to petitioner went far beyond the consitutional bounds in limiting her testimony to what was related to the hypnotist and recorded by the hypnotist in the prehypnotic interview. The evidence before the trial court at the time of the trial was that peitioner had made prior statements to the police and to her defense attorney, as well as to the psychologist in question. It was arbitrary and unreasonable, in view of other statements by petitioner, to limit her testimony strictly to those matters which the psychologist deemed significant enough to write down.

It seems axiomatic that what might be important to a professional in the field of psychology could differ greatly from matters considered important by the defense attorney. That restriction of petitioner's testimony effectively proscribed petitioner's testimony to areas considered significant by a non-professional in the area of preparation of her testimony for trial. Petitioner submits that if the testimony was to be limited at all, it should have included things remembered prior to hypnosis and stated to any of the persons who took statements, including the police and petitioner's attorneys.

Such cases that deal with the subject in great detail, such as *Contreras v. State*, 718 P.2d 129 (Alaska,1986), have dealt with the subject in the context of the identification of a suspect by a prosecution witness whose memory had been hypnotically enhanced and not with the right of a defendant to testify. Indeed, although the procedure has been in widespread use in Arkansas by law enforcement agencies and prosecuting attorneys for the identification of suspects and the enhancement of memory, not a single Arkansas case has even identified, much less refused, hypnotically refreshed testimony or identification by the prosecution. The line of cases that developed to protect criminal defendants from prosecuting witnesses should not now be used to defeat the due process rights of the petitioner.

During direct examination by petitioner's counsel, the Court vigorously enforced the order to the point that petitioner was able to say virtually nothing concerning the events which led to the death of her husband, other than to paraphrase what was on the notes of the hypnotist. On cross-examination, however, the prosecution was allowed the widest possible latitude in cross-examination over exactly those same points, using not only the notes of the psychologist, but the psychologist's previous out-of-court testimony to cross-examine petitioner. During the cross-examination, petitioner was still under the strong admonition from the Court and her attorney that she was not to say anything that she hadn't had included on the hypnotist's notes, making it virtually impossible for her to answer the prosecution's cross-examination questions and making her appear devious and unresponsive to the jury. When petitioner's defense counsel attempted to erase that impression on redirect, the rigid rule was again applied by the Court. In short, the Court allowed the prosecution to have the benefit of the rule without the responsibility or limita-

tion of it for purpose of cross-examination, which resulted in manifest harm to the presentation of petitioner's case and thus a substantial denial of due process by law.

In concluding its discussion of the due process issue, the Arkansas Supreme Court stated "any prejudice or deprivation caused to appellant in this case was minimal and resulted from her own actions and not by any erroneous ruling of the court", *infra*.That statement ignores the fact that not one single court decision in Arkansas, and not one Arkansas statute and not one Arkansas court rule even suggested the consequences imposed by the trial court and upheld by the Arkansas Supreme Court. The only Arkansas law to deal with the subject of refreshed recollection is Rule 612, Arkansas Uniform Rules of Evidence, and that rule suggests the permissive approach suggested by Morgan, *supra*. Petitioner submits the suggestion of self-induced error is singularly inappropriate under the circumstances, and the Arkansas Supreme Court's result is too harsh to be tolerated within the context of due process of law.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of Arkansas
of April 21, 1986
Vickie Lorene ROCK, Appellant,
v.
STATE of Arkansas, Appellee.
No. CR85-215

STEELE HAYS, Associate Justice

Appellant was charged with manslaughter for the July 2, 1983 shooting of her husband. She was convicted and sentenced to ten years imprisonment and fined $10,000.

On appeal appellant's primary argument revolves around a hypnotic session conducted prior to the trial. Appellant could not remember everything about the shooting and without consulting the court nor informing the prosecutor, her attorney hired a psychiatrist to use hypnosis to induce recollection. Before hypnosis was begun, the psychiatrist, Dr. Bettye Back, interviewed appellant for an hour. Included in that interview was appellant's recollection of the shooting prior to hypnosis. No video or sound recording was made of the pre-hypnotic session, but Dr. Back made handwritten notes of the session.

The trial court ruled testimony of matters recalled by appellant due to hypnosis inadmissible because of its unreliability and because of the effect of hypnosis on cross-examination. Appellant was allowed to testify about things she remembered prior to being subjected to hypnosis though testimony resulting from post-hypnotic suggestion was excluded. We believe the trial court's ruling was correct.

I

HYPNOTICALLY REFRESHED TESTIMONY

Appellant makes two arguments relating to the court's ruling: the hypnotically refreshed testimony should have been admitted, and in the alternative, even assuming that such testimony is inadmissible, the trial court was unduly restrictive of appellant's testimony.

Divergence of Opinion on Admissibility

Hypnotically refreshed testimony has resulted in a divergence of opinion as to its proper treatment in the courtroom. Most courts agree there is some inherent unreliability in hypnotically refreshed testimony, but disagree as to how that affects admissibility. Some jurisdictions generally admit it, and do not view hypnotism as a

matter of scientific procedure, but merely a matter of credibility to be weighed by the trier of fact. See *Clark v. State* 379 So.2d 372 (Fla.Dist.Ct.App.1979); *State v. Greer*, 609 S.W.2d 423 (Mo.App.1980); *State v. McQueen*, 295 N.C. 96, 244 S.E.2d 414 (1978).

A second group of cases recognizes dangers in such testimony and allows it only if certain safeguards have been followed to minimize those dangers. See *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981); *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (1981); *State v. Long*, 32 Wash. App. 732, 649 P.2d 845 (1982); *State v. Armstrong*, 110 Wis. 2d 555, 329 N.W. 2d 386 (1983).

A third group of cases has found hypnotically refreshed testimony so unreliable the testimony is held inadmissible per se. See *People v. Shirley*, 31 Cal.3d 18, 181 Cal. Rptr. 243, 641 P.2d 775 (1982); *Collins v. Superior Court for the County of Maricopa*, 132 Ariz. 180, 644 P.2d 1266 (1982); *State v. Collins*, 52 Md. App. 186, 447 A.2d 1272 (1982); *State v. Mack*, 292 N.W.2d 764 (Minn.1980); *People v. Hughes*, 59 N.W.2d 523, 466 N.Y.S.2d 255 (1983); *Commonwealth v. Kater*, 388 Mass. 519, 447 N.E.2d 1190 (1983). (For a more comprehensive list of citations on the alignment of jurisdictions, see *People v. Shirley, supra: Collins v. Sup. Ct., supra; State v. Collins, supra; People v. Guerra*, 37 Cal.3d 385, 208 Cal. Rptr. 162, 690 P.2d 635 (1984).)

Current Trend Toward Exclusion

While it was said in *State v. Hurd, supra*, that a majority of courts have held hypnotically induced testimony admissible, the cases cited for that conclusion are from the previous decade. (*Hurd*,at p.91). The more recent trend is toward exclusion of such testimony. McCormick on Evidence § 206 (1984 3d ed.); *People v. Shirley, supra; State v. Atwood*, 39 Conn. Sup. 273, 479 A.2d 258 (1984). *Collins v. Sup. Ct., supra.* Typical of this trend is Maryland, which in 1968 permitted the testimony, treating the issue as one of weight rather than admissibility. *Harding v. State*, 5 Md.App. 230, 246 A.2d 302 (1968). *Harding* was the leading opinion on this point, yet in 1982 Maryland reversed its position and held that a witness who had been hypnotized may not testify to induce recollections. *Polk v. State*, 48 Md.App. 382, 427 A.2d 1041 (1981); *State v. Collins, supra.* McCormick notes that even in those jurisdictions that previously held post-hypnotic

testimony generally admissible, there is a trend toward insisting that rigorous safeguards be observed before the hypnotically refreshed memories are admissible, and "(t)he more prevalent view is that testimony about the post-hypnotic memories is not admissible." McCormick, *supra* at 623.

Courts adopting a rule of exclusion often rely on the test announced in *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923), that an expert witness "may not testify on the basis of scientific methodology unless the principles on which he relies have achieved general acceptance within the scientific community." Some critics contend that *Frye* is too strict and will exclude helpful and probative evidence. McCormick, *supra* § 203; Latin and White, Remote Sensory Evidence and Environmental Law, 64 Cal. L. Rev. 1300 (1976). We do not have to resolve that issue in this case, as we would find the hypnotically refreshed testimony inadmissible by either the Frye test, or some form of it, or by traditional evidentiary concepts, Unif. R. Evid. 403. To this same effect see McCormick, *supra* at 633.

Expert Opinion

While hypnosis may have gained recognition as an aid to therapy, it has not gained general acceptance as a means of ascertaining truth in the field of forensic law. Cases comprising the recent trend toward exclusion of hypnotically refreshed testimony have examined extensively the expert opinions in this field and have concluded that it is inherently unreliable and without sufficient acceptance to allow it in the courtroom. See, *People v. Shirley, supra; Collins v. Sup. Ct., supra; Commonwealth v. Kater, supra; State v. Collins, supra; People v. Quintanar,* 659 P.2d 710 (Colo.App.1982); *People v. Gonzales,* 415 Mich. 615, 329 N.W.2d 743 (1982); *People v. Hughes, supra, State v. Peoples,* 311 N.C. 515, 319 S.E.2d 177 (1984); *Commonwealth v. Nazarovitch,* 496 Pa. 97,, 436 A.2d 170 (1981); *Peterson v. State,* 448 N.E.2d 673 (Ind.1983); *Robinson v. State,* 677 P.2d 1980 (Okla.Cr.App.1984); *State v. Mack, supra, State v. Atwood,* 3 Conn. Sup. 273, 479 A.2d 258 (1984).

Dr. Bernard L. Diamond, Professor of Clinical Psychiatry, University of California at Berkeley, in his article, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness,* 68 Cal. Law Review 313 (1980), states:

> I believe that once a potential witness has been

> hypnotized for the purpose of enhancing memory his recollections have been so contaminated that he is rendered effectively incompetent to testify. Hypnotized persons, being extremely suggestible, graft onto their memories fantasies or suggestions deliberately or unwittingly communicated by the hypnotist. After hypnosis the subject cannot differentiate between a true recollection and a fantasy or a suggested detail. Neither can any expert of the trier of fact. This risk is so great, in my view, that the use of hypnosis by police on a potential witness is tantamount to the destruction or fabrication of evidence. Recently, some courts have shown a healthy suspicion of the veracity of this sort of testimony. Yet even under stringent safeguards, including presentation to the trier of fact of the fullest possible information on the effects of hypnosis, the trier will not be able to sort out reality from witness fantasy and weigh this testimony properly.

People v. Shirley, supra, one of the leading cases for the rejection of hypnotically refreshed testimony, was recently reviewed in *People v. Guerra, supra.* The appellant in *Guerra* challenged the findings of *Shirley* as not being in step with recent developments in hypnosis in the scientific community. The California Supreme Court reviewed the studies and authorities since *Shirley* and found the experts even more cautious on the use of hypnosis in the courtroom. One of the more significant studies cited in *Guerra* is that of Dr. Martin T. Orne (Orne, et al,*Hypnotically Induced Testimony, In Eyewitness Testimony: Psychological Perspectives,* Wells & Loftus, edits.1984). Orne is widely cited on this issue, and it was his guidelines for the use of hypnotic testimony that were adopted by the New Jersey court in *Hurd v. State, supra. Guerra* points out Orne's current position;

> After discussing *Shirley* and the decisions that preceded and followed it, the authors agree that "The present state of scientific knowledge is consistent with the rules of a number of state supreme courts that memories retrieved through hypnosis are sufficiently unreliable that their use is precluded as eyewitness

> testimony in criminal trials...
> There is no way, however, by which anyone (including an expert with extensive experience in hypnosis) can for any particular piece of information obtained in hypnosis determine whether it is an actual memory or a confabulation. For these reasons, hypnotically induced testimony is not reliable and ought not be permitted to form the basis of testimony in court."

The dangers of hypnosis in memory retrieval are summed up in the *Guerra* opinion: the subject's capacity to judge the reality of his memories is impaired; he is apt to recall "memories" that never existed, yet be convinced those memories are real; he will produce on demand a recollection of an event which may be a compound of actual facts, irrelevant matter and highly plausible "confabulations"; hypnosis artificially increases the subject's confidence in both his true and his false memories and may enhance his credibility as a witness due to an attendant ability to increase dramatically the amount of detail, or the emotion with which those details are reported, though they may be simply "artifacts of the hypnotic process." Too, there is the likelihood that juries will place greater emphasis on testimony produced by hypnosis. See *Collins v. Sup. Ct., supra.*

Courts rejecting hypnotically refreshed testimony have been equally concerned with the effects on cross-examination, where the difficulties in memory retrieval and fabrication are compounded. The conviction on the part of the subject that he or she is stating the truth affects the truth finding process traditionally tested by cross-examination.

> The concern in the area of post-hypnotic testimony is that post-hypnotic memory may be different than pre-hypnotic memory. This memory alteration may result from purposeful or unwitting cues given by the hypnotist, the phenomenon of confabulation, and the need for the subject to achieve some sense of certainty within his or her own mind. The basic problem is that if a witness sincerely believes that what he or she is relating is the truth they become resistant to cross-examination and immune to effective

impeachment to ascertain the truth. *Collins v. Sup. Ct., supra.*

Much more could be said on the subject of hypnotically induced recollection, but we are satisfied from the more recent cases and the views of experts, the dangers of admitting this kind of testimony outweigh whatever probative value it may have.

Conditional Admissibility - the Hurd Guidelines

Appellant urges that if we do not allow hypnotically refreshed testimony unconditionally, we should adopt the guidelines of *State v. Hurd, supra.*[1] We note the appallant has not fully complied with those guidelines, but we are not inclined to follow Hurd in any case. The cases which have rejected *Hurd* have noted that some of the dangers of hypnotically induced testimony are not eliminated by the *Hurd* guidelines and others are not even addressed.[2] See *People v. Shirley, supra, Collins v. Sup. Ct., supra.*

---

[1]These safeguards are well outlined by the New Jersey Supreme Court: Whenever a party in a criminal trial seeks to introduce a witness who has undergone hypnosis to refresh his memory, the party must inform his opponent of his intention and provide him with the recording of the session and other pertinent material. The trial court will then rules on the admissibility of the testimony either at a pretrial hearing or at a hearing out of the jury's presence. In reviewing the admissibility of hypnotically refreshed testimony, the trial court should evaluate both the kind of memory loss that hypnosis was used to restore and the specific technique employed based on expert testimony presented by the parties. the object of this review is not to determine whether the proffered testimony is accurate, but instead whether the use of hypnosis and the procedure followed in the particular case was a reasonably reliable means of restoring the witness' memory.

The first question a court must consider is the appropriateness of using hypnosis for the kind of memory loss encountered. The reason for a subject's lack of memory is an important factor in evaluating the reliability of hypnosis in restoring recall. According to defendant's expert, Dr. Orne, hypnosis often is reasonably reliable in reviving normal recall where there is a pathological reason, such as a traumatic neurosis, for the witness' inability to remember. Orne, supra, at 325. On the other hand, the likelihood of obtaining reason-

ably accurate recall diminishes if hypnosis is used simply to refresh a witness' memory or concerning details where there may be no recollection at all or to "verify" one of several conflicting accounts given by a witness. Id. at 324, 322. A related factor to be considered is whether the witness has any discernible motivation for not remembering or for "recalling" a particular version of the events. In either case, the possibility of creating self-serving fantasy is significant...

Once it is determined that a case is of a kind likely to yield normal recall if hypnosis is properly administered, then it is necessary to determine whether the procedures followed were reasonably reliable. Of particular importance are the manner of questioning and the presence of cues or suggestions during the trance and the post-hypnotic period . . . . (citing Orne and Others) An additional factor affecting the reliability of the procedure is the amenability of the subject to hypnosis....

To provide an adequate record for evaluating the reliability of the hypnotic procedure, and to ensure a minimum level of reliability, we also adopt several procedural requirements based on those suggested by Dr. Orne and prescribed by the trial court.... Before it may introduce hypnotically refreshed testimony, a party must demonstrate compliance with these requirements.

First, a psychiatrist or psychologist experienced in the use of hypnosis must conduct the session....

Second, the professional conducting the hypnotic session should be independent of and not regularly employed by the prosecutor, investigator or defense.

Third, any information given to the hypnotist by law enforcement personnel or the defense prior to the hypnotic session must be recorded, either in writing or in other suitable form....

Fourth, before inducing hypnosis the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them....

Fifth, all contacts between the hypnotist and the subject must be recorded. This will establish a record of the preinduction interview, the hypnotic session, and the post-hypnotic period, enabling a court to determine what information or suggestions the witness may have

received....

Sixth, only the hypnotist and the subject should be present during any phase of the hypnotic session, including the prehypnotic testing and the post-hypnotic interview... *State v. Hurd, supra.*

---

[2]In deciding to discard the *Hurd* approach, the *Shirley* court noted initially that it was not persuaded that the requirements adopted in *Hurd* and other cases would eliminate each of the dangers at which they were directed.

> For example, one of the requirements set forth in *Hurd* is that all contacts between the hypnotist and the subject must be recorded for the stated purpose of enabling the trial court to determine what "cues" the hypnotist may have conveyed to the subject by word or deed; and the opinion strongly encouraged the use of videotape to make such recordings. Yet as the same opinion recognizes elsewhere, "Because of the unpredictability of what will influence a subject, it is difficult even for an expert examing a videotape of a hypnotic session to identify possible cues." If even an expert cannot confidently make that identification, it is vain to believe that a layman such as a trial judge can do so. 181 Cal Rptr. at 255. f.n. 24

The court points out that certain dangers of hypnosis are not even addressed by the *Hurd* requirements recognized elsewhere in that opinion, such as the subject losing his critical judgment and crediting memories that were formerly viewed as unreliable, confusing actual recall with confabulation and the unwarranted confidence in the validity of his ensuring recollection.

Of equal importance, to adopt the guidelines would further burden the pretrial process with no off-setting benefit: the guidelines require that the opposing party be notified of the intent to use hypnosis and be furnished a recording of any sessions; only a psychologist or psychiatrist experienced in hypnosis, and independent of either

the state or the defense, may be used; all sessions must be recorded and the trial court in a pretrial or chambers hearing must decide a number of issues determinative of whether the induced testimony should be received, such as the presence of cues or suggestions by the hyptonist. The burden of proof is by clear and convincing evidence.

In light of this questionable provative value of such proof and the risk inherent in the means by which it is retrieved, we think it would be a serious mistake to further encumber the pretrial process with the steps outlined in Hurd. We agree with the comment in *People v. Shirley, supra*:

> On the other hand, it takes little prescience to foresee that these and related issues would provide a fertile new field for litigation. There would first be elaborate demands for discovery, parades of expert witnesses, and special pretrial hearings, all with concomitant delays and expense. Among the questions our trial courts would then be expected to answer are scientific issues so subtle as to confound the experts. Their resolution would in turn generate a panoply of new claims that could be raised on appeal, including difficult questions of compliance with the "clear and convincing" standard of proof. And because the hypnotized subject would frequently be the victim, the eyewitness, or a similiar source of crucial testimony against the defendant, any errors in ruling on the admissibility of such testimony could easily jeopardize otherwise unimpeachable judgments of conviction. It our opinion, the game is not worth the candle.

Appellant's Testimony Restricted

We turn to appellant's argument that the trial court's limitations on her testimony were too restrictive. Courts that decline to permit hypnotically refreshed testimony are often faced with the difficulty of dealing with a witness who has already undergone hypnosis. The concern focuses on determining what the witness could remember prior to hypnosis and insuring that the opposing party not be deprived of the opportunity for effective cross-examination because of the in-

fluence of hypnosis. *Collins v. Sup. Ct., supra.*

The likelihood of contamination was deemed so pronounced in People v. Shirley, supra, that the court ruled a previously hypnotized witness was wholly incompetent to testify on matters dealt with while under hypnosis. However, the general response has been to permit the testimony of those recollections held prior to hypnosis, and on topics unrelated to those covered by hypnosis. To ascertain just what those memories are and to render that testimony admissible, the courts require verification by way of a detailed record by the hypnotist of the pre-hypnotic session. A preferred method is video or sound recording, *Collins v. Sup. Ct., supra,* and some courts have suggested the *Hurd* guidelines be followed when pertinent to a particular case, *People v. Hughes, supra; Collins v. Sup. Ct., supra.* The *Hurd* guidelines, or something similar, are proposed as there is still a danger that the hypnosis could be so suggestive as to affect the pre-hypnotic memory as well. Once it has been shown by clear and convincing evidence that testimony of pre-hypnotic recollection is reliable a subject may testify, but only to those memories demonstrably shown to be a product of the memory prior to hypnosis. The burden of proving the reliability is on the proponent of the testimony. *Commonwealth v. Kater, supra, People v. Shirley, supra, Collins v. Sups. Ct., supra, People v. Hughes, supra, State v. Atwood, supra.*

The trial court in this case chose the course of excluding testimony induced by hypnosis and admitting testimony of the appellant based on pre-hypnotic recollection. The difficulty was determining what that recollection was, based only on a record from the pre-hypnotic session with Dr. Back, a record admittedly incomplete. In this situation the trial court limited the appellant to what she could recall without the benefit of hypnosis, as evidenced by Dr. Back's notes and enlarged by Dr. Back's memory of her discussions with appellant before she was placed in a hypnotic state.

Appellant argues the court misapplied the rule employed by courts where hypnotically induced testimony is inadmissible and was too restrictive. Appellant, however, never demonstrated how the rule was violated. The rule simply limits the hypnotized subject's testimony to those matters demonstrably recalled prior to testimony. Any other testimony on the topic runs all the risks discussed earlier in hypnotically refreshed memories. Here, the court was in a difficult posi-

tion as the defense supplied only partial notes of the pre-hypnotic session.

Nevertheless, the appellant was allowed to testify to those items referred to in the notes and given considerable latitude in explaining them in her own words. The trial court also allowed testimony on matters Dr. Back had previously testified were covered in the pre-hypnotic session. The burden was on appellant to establish a reliable record of the testimony. She cannot now claim error because the court restricted her to the record she offered.

Dr. Back testified that during the hypnotic session she took appellant back to her childhood and brought her forward to the shooting incident. Under these circumstances, in order to avoid testimony on topics covered in the sessions that were not previously preserved the trial court could have limited appellant entirely to the notes and testimony of Dr. Back. However, to give appellant as much latitude as possible, the trial court applied that order only to the day of the shooting. Appellant complains that ruling was too restrictive and should have been limited to the explanation of the shooting incident itself. We find no support for this argument. Appellant does not deny that other events of the day were covered in the sessions, nor that they were relevant, but maintains the primary purpose of the session was to find out how the gun went off. While this may be so, the record reveals that the time covered in the sessions included the day of the shooting and, if anything, the ruling was generous. As noted in our discussion of appellant's next point, the most significant events of that day were included in Dr. Back's notes and appellant was able to testify to those matters.

Appellant suggests the better method of determining her pre-hypnotic memory would be her own recollection, and not the notes of Dr. Back. Appellant cites no authority and we think it would be circumventing the very reasons for excluding hypnotically refreshed memory to permit the witness to decide what was remembered naturally and what was induced by hypnosis. A similar suggestion was made in *Shirley*, to which the court responded:

> (I)t is the consensus of informed scientific opinion today that in no case can a person previously hypnotized to improve his recollection reliably determine whether any unverified item of his testimony

originates in his own memory or is instead a confusion or confabulation induced by the hypnotic experience. It would fly in the face of that consensus to allow a witness to be the judge of which portions of his testimony were actually produced by hypnosis.

II

CONSTITUTIONAL RIGHT TO TESTIFY

Appellant maintains the exclusion rule of hypnotically refreshed testimony should not be applied to defendants because it violates their constitutional right to testify in their own behalf. Of course, a defendant's right to testify is fundamental, but even that right is not without limits. A defendant with language difficulties, for example, may not eschew diligence and wait until the morning of trial to seek the assistance of an interpreter. *Figeroa v. State*, 244 Ark. 457, 425 S.W.2d 516 (1968). Even defendants are subject to the rules of procedure and evidence, such as hearsay, or other instances of evidentiary exclusion, e.g. evidence that is prejudicial, confusing, misleading, cumulative or time consuming.

In *Greenfield v. Robinson*, 413 F. Supp. 1113 (1976) the same argument was made by a defendant who had no recollection of the crime, a murder. He argued that hypnotic testimony was the only evidence he could offer in his defense, that it would be a violation of his constitutional rights to deny him the right to testify, citing *Chambers v. Mississippi*, 410 U.S. 284 (1973).

The cases are easily distinguishable, as the *Greenfield* court found. *Chambers* primarily found a hearsay exception for evidence offered by the defense because of reliability. The *Greenfield* court pointed out it was excluding the hypnotically induced testimony for the very reason that it was unreliable, after reviewing expert opinion on the issue:

> This court knows of no rule that requires a judge to accept evidence of uncertain value to go to a defense that is otherwise completely uncorroborated. The mere fact that a crime has no witnesses or direct evidence does not warrant a court to accept evidence that may be able to tell the trier of fact something

> about the crime, but may be of dubious quality. As a constitutional principle then this court simply finds that petitioner's due process guarantees were not abrogated by the trial court's refusal to permit the defendant to relate his story under hypnosis. *Greenfield* at 1120-21.

In *State v. Atwood, supra,* a defendant charged with the murder of his wife had no recollection of the event and made the identical argument. The *Atwood* court had not previously considered the hypnosis problem and made a finding on that issue first, aligning itself with those jurisdictions which exclude hypnotically refreshed testimony. The court then dealt with appellant's constitutional right to testify in his behalf. Citing *Greenfield, supra,* the *Atwood* court decided it was not required to accept such testimony, even if it was all the defendant had, noting it was not required to "accept evidence of uncertain value that is otherwise completely uncorroborated." The court held the defendant's constitutional rights were not violated.

We think the same reasoning applies here. Appellant's testimony was restricted only by what, in effect, are standard rules of evidence. The probative value of the proffered testimony is questionable, as we have seen, but in any case, it is substantially outweighed by the other considerations discussed. We note that appellant was in a far better position than either defendant in *Atwood* or *Greenfield* who had no testimony to offer other than hypnosis in that she was allowed to relate the substance of her version of the shooting to the jury, which she had remembered prior to hypnosis. Appellant's defense was that the shooting was an accident and this she was able to adequately relay to the jury. She testified that she and her husband were quarreling, that he pushed her against the wall, that she wanted to leave because she was frightened, and her husband wouldn't let her go. She said her husband's behavior that night was unusual, and the shooting was an accident, that she didn't mean to do it and that she would not intentionally hurt her husband.

In reality nothing was excluded that would have been of much assistance to appellant, or would have enlarged on her testimony to any significant degree. Yet given the available information on the effect of hypnosis and the attendant difficulties of such testimony, the state's desire to confine appellant's testimony to the pre-hypnotic

memories is warranted. The trial court was faced with a difficult situation at best when presented with a witness who had been hypnotized and the damage done before any ruling could be made. We think the trial court took the proper course in its ruling and any prejudice or deprivation caused to appellant in this case was minimal and resulted from her own actions and not by any erroneous ruling of the court. We can find no violation of her constitutional rights.

III

APPELLANT'S OUT-OF-COURT STATEMENT

Appellant alleges error in the trial court's exclusion of a statement in a police officer's report, attributed to the appellant, that she "had the gun in her hand and it went off." The statement was excluded as hearsay. Appellant relies on Unif. R. Evid. 801(d):

> Statements which are not hearsay. A statement is not hearsay if: (l) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ...(ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive...

Rule 801 does not sustain the argument, as the proffered statement does not come within the exception. For the rule to apply, the prior consistent statement must be made *before* a motive to falsify has arisen:

> (I)f the attacker has charged bias, interest, corrupt influence, contrivance to falsify, or want of capacity to observe or remember, the applicable principle is that the prior consistent statement has no relevancy to refute the charge unless the consistent statement was made before the source of the bias, interest, influence or incapacity originated. McCormick on Evidence, § 49 (1984).

The same principle has been explained in other words:

> Some decisions also mention that the consistent statement should have been made before the witness

would foresee its effect upon the fact issue. *Id*, n. 24.

In *Brown v. State*, 262 Ark. 298,556 S.W.2d 418 (1977), the defendant made the same argument. Brown testified that he was in Memphis at the time of the robbery. A witness was called to testify that Brown telephoned her that evening and said he was in Memphis. The statement was excluded as hearsay, Rule 801 having no application to the case, because "Brown, if guilty, had the same motive for fabrication when he made the alleged telephone call as he had when he testified in the case." We further stated in *Kitchen v. State*, 271 Ark. 1, 607 S.W.2d 345 (1980), the statements were not admissible "because the motive for fabrication was as great when the first statement was made as when the testimony was given."

Similarly, appellant's motive in describing the shooting as an accident at the time of arrest was the same as it would be when giving that testimony at trial. The court was correct in excluding the testimony as hearsay.

IV

INTRODUCTION OF HASHISH REFUSED

The final point of error concerns a small amount of hashish found in Frank Rock's shirt pocket following the shooting. There is no proof that he had used it, nor what the effects might be if he had, but appellant insists she should have been permitted to offer this proof as having relevance to the alleged violent behavior by Rock. The premise is too conjectural on this record and whether its relevance warranted acceptance was within the trial court's discretion. *Hamblin v. State*, 268 Ark. 497, 597 S.W.2d 589 (1980); *Shelton v. State* 287 Ark. 322, 699 S.W.2d 728 (1986).

AFFIRMED.

Purtle, J., not participating.

Judgment of the Circuit Court of Benton County, Arkansas
February 2, 1985

State of ARKANSAS, Plaintiff

vs

Vickie Lorene ROCK, Defendant
No. CR-83-338-1

JUDGMENT

NOW on this 6th day of February, 1985, this cause coming on to be heard, the State appearing by David Clinger, Prosecuting Attorney, and Xollie Duncan, Deputy Prosecuting Attorney, and the Defendant, Vickie Lorene Rock, appearing in person and by her attorneys, E.E. Maglothin, Jr., Esther M. White, and Eugene Kelley, and the Defendant, having been previously arraigned and entered her plea of NOT GUILTY to the charge of Manslaughter - Class C Felony, all parties announced ready for trial on the 6th day of February, 1985, and a jury of twelve from the regular panel of petit jurors were impaneled and sworn to try the cause, and, having heard the evidence, the instructions of the Court, and the arguments of counsel, retired to consider its verdict. The trial having lasted four days, the Jury, on the 11th day of February, 1985, returned into courts its verdict of guilty.

Defendant comes on now, on this 22nd day of February, 1985, ready for sentencing.

IT IS, THEREFORE, CONSIDERED, ORDERED, AND ADJUDGED BY THE COURT that the Defendant, Vickie Lorene Rock, is guilty of Manslaughter - Class C Felony, and that she be and hereby is sentenced to TEN YEARS in the Arkansas Department of Correction and a TEN THOUSAND DOLLAR FINE, payable sixty days after her release from prison.

Defendant is continued on her present bond pending appeal, and is advised that notice of appeal must be filed within thirty days. Notice must include a certificate by the Court Reporter that the transcript has been ordered and necessary arrangements have been made to assure its preparation.

CIRCUIT JUDGE
ENTERED: 22 FEBRUARY 1985

xvii

Pretrial Order of the Circuit Court of Benton County, Arkansas
December 7, 1984

State of ARKANSAS, Plaintiff

vs

Vickie Lorene ROCK, Defendant

No. CR-83-338-1

ORDER

NOW on this 26th day of November, 1984, comes on the captioned matter for pre-trial hearing, and the Court finds:

1. On September 27 and 28, 1984, Defendant was placed under hypnotic trance by Dr. Bettye Back, PhD, Fayetteville, Arkansas, for the express purpose of enhancing her memory of the events of July 2, 1983, involving the death of Frank Rock.

2. Dr. Back was professionally qualified to administer hypnosis. She was objective in the application of the technique and did not suggest by leading questions the responses expected to be made by Defendant. She was employed on an independent, professional basis. She made written notes of facts related to her by Defendant during the pre-hypnotic interview. She did employ post-hypnotic suggestion with Defendant. No one else was present during any phase of the hypnosis sessions except Dr. Back and Defendant.

3. Defendant cannot be prevented by the Court from testifying at her trial on criminal charges under the Arkansas Constitution, but testimony of matters recalled by Defendant due to hypnosis will be excluded because of inherent unreliability and the effect of hypnosis in eliminating any meaningful cross-examination on those matters. Defendant may testify to matters remembered and stated to the examiner prior to being placed under hypnosis. Testimony resulting from post-hypnotic suggestion will be excluded.

IT IS SO ORDERED.

CIRCUIT JUDGE

ENTERED: 7 DECEMBER 1984,
NUNC PRO TUNC

Supreme Court, U.S.
FILED
OCT 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

October Term, 1986

In the Supreme Court of the United States

No. 86-130

Vickie Lorene Rock ..... *Petitioner*

V.

State of Arkansas ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

RESPONDENT STATE OF ARKANSAS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

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October Term, 1986

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RESPONDENT STATE OF ARKANSAS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

REASON FOR DENYING THE PETITION FOR CERTIORARI

I.

THE ARKANSAS SUPREME COURT'S ASSESSMENT OF PETITIONER ROCK'S TESTIMONY AT TRIAL IS CORRECT IN THAT PETITIONER ROCK WAS ABLE TO TESTIFY IN SUFFICIENT DETAIL SUCH THAT SHE WAS ABLE TO DEFEND HERSELF.

There are no issues of constitutional law presented in the instant case that are worthy of a grant of certiorari by this Court. Petitioner Rock's petition poses no issues of constitutional law for which there is an urgent need for

national uniformity. Nor does Rock's petition present an instance of manifest injustice such that there is a reasonable probability that an innocent person was wrongfully convicted. Rock's petition does present a fact-bound record which she invites this Court to reinterpret.

On review by certiorari of affirmances by state appellate courts in criminal cases, this Court will not determine anew the existence of historical facts. *See Watts v. Indiana*, 338 U.S. 49, 50-1 (1949). However, where inferences drawn from historical facts bear on the infringement *vel non* by the State of a defendant's constitutional rights, then this Court will analyze the facts of the case, such as they are, to see if the defendant's constitutional rights were denied. *Drope v. Missouri*, 420 U.S. 162, 174-75 (1975); *Watts v. Indiana*, *supra*; and *Norris v. Alabama*, 294 U.S. 587, 590 (1935).

Rock can only obtain relief from this Court if it disagrees with the conclusion reached by the Arkansas Supreme Court concerning Rock's alleged inability to testify in her own defense. All Rock's arguments in her petition ultimately assert this claim. The Arkansas Supreme Court reviewed Rock's trial testimony and concluded " . . . nothing was excluded that would have been of much assistance to appellant, or would have enlarged on her testimony to any significant degree." Appendix at xiii. Rock's three arguments amount to an invitation to this Court to disagree with the assessment by the Arkansas Supreme Court of her trial testimony. She has completely failed to show *how* the Arkansas Supreme Court's assessment of her testimony is incorrect. Respondent submits that as a matter of fundamental fairness, arising out of concerns for due process, Rock's testimony to the jury that the shooting of her husband was an accident and that she did not mean to shoot him enabled Rock to defend herself at trial. This is especially so given that Rock, as she admits in her petition, was able to introduce expert testimony which established that the pistol at issue could easily have discharged accidentally. Petition at 8.

CONCLUSION

THEREFORE, respondent respectfully requests that this Honorable Court deny petitioner Rock's petition for a writ of certiorari to the Supreme Court of Arkansas.

Respectfully submitted,

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No. 86-130

Supreme Court, U.S.
FILED
DEC 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

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Petitioner,

vs.

STATE OF ARKANSAS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 25, 1986
CERTIORARI GRANTED NOVEMBER 10, 1986

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NOTATION

The opinion of the Supreme Court of Arkansas is reprinted in full in Appendix A to the petition at page i.

The judgment of the Circuit Court is reprinted in full in Appendix A to the petition at page xvi.

The pre-trial order of the Circuit Court is reprinted in full in Appendix A to the petition at page xvii.

The order of the Supreme Court of Arkansas denying rehearing is reprinted in full in Appendix A to the petition at page xviii.

RELEVANT DOCKET ENTRIES

CRIMINAL DOCKET

Date of Orders	Orders of Court
09-07-83	Order per precedent.
06-25-84	Defendant appeared with counsel and pleaded not guilty. Omnibus Hearing set for 07-09-84. Bond set at $2,500.00. Release 10% deposit.
07-09-84	Omnibus Hearing, order. Trial set for 10-01-84.
10-01-84	Order per precedent.
11-26-84	Pre-trial hearing on question of hypnosis of defendant for purpose of memory enhancement. Defendant will be permitted to testify, but evidence of matters recalled due to hypnosis will be excluded. Evidence of matter remembered and stated before hypnosis will be admissible.
12-04-84	Parties announced ready for trial. Jury empanelled and sworn. Opening statements by counsel. Court adjourned at 5:00 p.m. after admonishing jury.
12-06-84	Court convened at 9:00 a.m. Testimony on behalf of State begun. Upon being advised of a possible irregularity in the jury, the Court held hearing in chambers and found one juror impliedly biased. On motion of State and defendant Court declared mistrial and bound defendant over to new venure. Trial set for 02-06-85. Defendant continued on bond.
02-06-85	Parties announced ready for trial. Jury empanelled and sworn. Testimony on behalf of State begun. Court adjourned at 5:00 p.m. after admonishing jury.
02-07-85	Court convened at 9:00 a.m. Testimony on behalf of State resumed. Court adjourned at 5:00 p.m. after admonishing jury.

Date of Orders	Orders of Court
02-08-85	Court convened at 9:00 a.m. Testimony resumed on behalf of State. State rested. Motion tion for directed verdict overruled. Testimony on behalf of defendant begun. Court adjourned at 5:00 p.m. after admonishing jury.
02-11-85	Court convened at 9:00 a.m. Testimony resumed on behalf of defendant. Defendant rested. Rebuttal testimony received. Instructions by Court. Arguments of counsel. Jury retired to deliberate and returned into Court verdict of guilty of manslaughter. Sentencing set for 02-22-85. Defendant continued on present bond.
02-22-85	Defendant appeared with counsel for sentencing. Defendant sentenced to 10 years in Department of Corrections and $10,000.00 fine payable 60 days after release from the department. Defendant given right of allocation and advised by Court of right to appeal.
06-17-85	Order allowing extension of time.

Relevant excerpts from the transcripts of evidence adduced at the trial of this action in the Circuit Court of Benton County, Arkansas

EXCERPTS FROM THE TESTIMONY OF ALLEN STRICKLAND:

CROSS EXAMINATION

(p. 359) By Mr. Maglothin:

Q Officer Strickland, you were kind enough to provide me with your report and your notes and everything at the break and I appreciate it. Now, your testimony was that Vickie told you—now, in this interview, was that the same one that Officer Roles had with her?

A That's correct.

Q You-all conducted this interview together?

A That's correct.

Q And so he either took notes or he made a report and you made a report?

A Yes, sir.

Q All right. And she told you in this same interview with Officer Roles, "I then asked her to tell me what happened. She stated that, she said that she told her husband she was going to go outside." Now, I guess referring, outside the apartment?

A Yes, sir.

Q "She stated that she told her husband"—excuse me—"when he refused to let her leave and grabbed her by the throat and began choking her"; correct?

A Yes, sir. Sounds correct.

Q "She struggled for a moment and she grabbed the (p. 360) gun"? So the indication that you got was she tried to leave this living area; correct?

A That's correct.

Q And as she was trying to leave a struggle broke out, she got choked, and she grabbed the gun?

A (Witness nods affirmatively.)

Q Now then, you testified about this apartment being cluttered? It had a small living area?

A Uh-huh.

Q But, now—how many years do you have in law enforcement, officer?

A Nine years.

Q You would agree with me, for instance, this courtroom is kind of cluttered, but if I was going out that door you could really work me over right there by the door and not disturb anything in this courtroom if I'm, if you wanted to?

A I presume I could; yes, sir.

Q All right. And then when looking at the pictures, you testified earlier that, you know the picture by the door, there was a space there where somebody in essence could have been choked without knocking anything over?

A Correct.

Q Shoved without knocking anything over?

(p. 361) A In that particular space, after looking at the picture, I don't think so.

Q Well, let's look at that picture.

A There's not as much room there as I had recalled.

Q Well, wait a minute. Let me ask the questions. Let's look at this door right here. If I was going out this door, you could shove me up against that door and if there are whatnots all around here and I hit that door, it wouldn't knock anything over; would it, sir?

A No, sir.

Q If you look at State's Exhibit No. 11, there's nothing, not anything on the left side of the door right next to it; is there?

A There's a bookcase right here just outside the screen area, there's a space there.

Q But there's not anything right in the immediate area of the door; is there?

A Right.

Q All right. "She told him to leave her alone and he hit her, at which time the gun went off"? You recall her saying this; don't you?

A I recall her saying she shot him.

Q Well, now, wait a minute here. What did you put in your little report?

(p. 362) A This is a typed report, "Grabbed her by the throat and began choking her. They struggled for a moment and she grabbed a gun".

Q The gun, you'll have to speak a little louder.

A I'm trying to get down to where you were at there at the . . . . "she told him to leave her alone and he hit

her, at which time the gun went off", that's what the report says.

Q Just a second ago, you made the statement that she said she shot him; correct?

A That's right.

Q Now, but this is what she said, right, because that's what you put in your report?

A She said that she shot him.

Q Well, let's look at your notes right back of that that you took, you—did you take these notes contemporaneously?

A Just after the interview, after I—

Q In these notes, "she picked up the gun, victim hit her, subject then shot victim"; right?

A Yes.

Q So you got two different accounts which are, in your own mind, the same thing; correct?

A Yes, sir.

Q All right. Let me have your report back. "She (p. 363) stated that it was an accident and she didn't mean to shoot him"?

A That's correct.

Q And she told you that, correct, and you have got that in your report, your typewritten report?

A Yes, sir.

Q "She wanted to go to the hospital to make sure everything was all right"? She said that and you've gotten that in here and in your written report; correct?

A I believe I do.

* * *

(p. 375) REDIRECT EXAMINATION

By Mr. Clinger:

Q Allen, let's see, we have—I'll give you back your report; all right? I believe that when you testified to the Jury you testified definitely that you recall the Defendant saying that she had shot Frank Rock; is that the language she used?

A She said that he had hit her and that she shot (p. 376) him.

Q All right. Now, Mr. Maglothin has used two documents to refer to and I assume—well, let's first go to your field notes. Do you have those with you at this time?

A Yes, I do.

Q All right. You have got the live, original copy?

A Yes.

Q When did you do these? When did you write up this, these notes, this handwritten deal?

A At the crime scene when, while I was waiting on Lieutenant Jones to arrive.

Q How much time had gone by from the time that you had taken this statement from the Defendant? How

much time had elapsed before you sat down and wrote this out?

A I believe about a half hour.

Q Okay. Fairly fresh on your mind at that time; is that correct?

A Yes, it was.

Q Okay. In this, does this contain your statement you have testified to that she, he hit her and then she shot him?

A Yes.

Q And that's exactly what is here, that's the exact (p. 377) language there?

A Exact language.

Q You stated that you wanted to—just read in whatever you wrote.

A All right. "Ask subject what happened. Subject stated that she told husband she was going outside and he refused to let her. He grabbed her around the neck, she picked up the gun, victim hit subject, subject then shot victim. Stated it was an accident and she didn't mean to shoot him", is what it says.

Q Kind of late?

A "Wanted to go to the hospital to make sure everything was all right."

Q All right. Where were you when you wrote this out?

A I was in my car at the crime scene.

Q Waiting for Detective Jones to arrive?

A Yes, sir.

Q You wrote this out before you had processed the scene?

A I'd been into the scene, I had made this diagram at that time without the measurements, and went out and wrote this up.

Q All right. When Jones got there, is that when (p. 378) you went around and took pictures and gathered up evidence?

A Right.

Q You say when you wrote these notes out, what did you do with them?

A They were placed in the investigative file.

Q Okay. Then I believe that you later came up with a two-page typewritten report which included just about everything you did that evening; is that correct?

A Yes, sir.

Q Okay. In fact, you talked about the evidence you obtained at the scene?

A Yes, sir.

Q All that stuff; is that correct?

A Yes.

Q You even talked about the MDT?

A Yes, sir.

Q When you were specifically referring to the statement she gave you, to you—get out your notes and read them—how did you come up with this?

A I turned on the tape recorder and put a heading on it and verbally indicated on the tape recorder what had happened.

Q You tried to cover everything that had gone on (p. 379) from the time you were called in?

A From the time I was called in until all the evidence was turned in to Detective Armstrong.

Q All right. In this report, as has been pointed out correctly by the defense attorney, as you go through the choking business, "grabbed her by the throat and began choking her", I believe you already testified you didn't see any signs that she had been choked or struggle—"they struggled for a moment and she grabbed a gun, she told him to leave her alone and he hit her, at which time the gun went off". Obviously you've got a conflict in the statements. "The gun went off and she shot him, shot the victim. Subject then shot victim." Which one is it? Which one is an accurate statement?

A What she told me, said, "he hit me and I shot him"

* * *

EXCERPTS FROM THE TESTIMONY OF VICKIE L. ROCK

* * *

(p. 839) Q All right. Now then, I'd like to bring you up to July the 2nd, 1983. I want you to start when you and Frank got up that morning. Tell the Jury what happened that day?

A Frank went to work for the recycling on Saturday from eight to noon—

Mr. Clinger: Your Honor, if it please the Court, may we approach the Bench?

The Court: All right.

(Reporter's Note: The attorneys out of the hearing of the Jury at the Bench.)

Mr. Clinger: Your Honor, I think this is a flagrant violation of your order. It's my understanding that it limited her testifying to the events of the day (p. 840) leading up to Frank's death strictly to what she told Dr. Betty Back or these officers. This is brand new. I have never heard this before. She did not tell this to the officers or Betty Back.

Mr. Maglothin: Well now, I think this court order went specifically to how the gun went off.

The Court: No, no. It went to anything that was not included in the pre-hypnotic session.

Mr. Maglothin: As far as general background?

The Court: As far as the day of the crime.

Mr. Maglothin: As far as the day of the crime?

The Court: That's correct.

(Reporter's Note: Back within the hearing of the Jury.)

(p. 841) By Mr. Maglothin:

Q Vickie, on July the 2nd, 1983, did you and Frank have a discussion about moving out to the trailer?

A Yes, sir, we did.

Q Explain to the Jury about that discussion?

Mr. Clinger: Objection, Your Honor. May we approach the Bench?

The Court: Well, if it's the same thing, I have already ruled on it.

Mr. Maglothin: Judge, it's the first sentence in her notes, "Patient states she and husband were discussing moving out to a trailer she had previously owned". I think she can testify to that.

The Court: Sure.

Mr. Clinger: What I'm going to ask is if she goes on and says they were arguing and fighting or were quarrelling, these are specific excerpts from (p. 842) Dr. Betty Back.

Mr. Maglothin: That brings up another point I'd like to introduce of her testimony about some of these things that Dr. Betty Back—I thought the Court limited it to these two pages of notes.

Mr. Clinger: And her testimony, is my understanding.

The Court: Maybe the Court can clarify.

Mr. Clinger: We looked at the order and I think it says exactly what she said.

The Court: I don't understand what the dispute is right now.

Mr. Maglothin: The question is can I ask her things concerning, Betty Back testified to some things that Vickie told her that was pre-hypnotic that is not reflected in her notes. I thought the court order was confined, confined it to these two pages of notes.

(p. 843) The Court: No. My order was, I will have to refresh myself on it, but my order was that she be limited to testifying to matters which she recalls at the time of her pre-hypnotic session with the doctor. Now, whether it's in the statement or whether if's not in the statement doesn't make any difference to me. All I'm concerned about is that she not testify to anything from a post-hypnotic session.

Mr. Maglothin: I understand that and I think the specific line of questions about the discussion of the trailer referred to in the notes here—

Mr. Clinger: Your Honor, I have not—no objection to it being brought up. I'm talking about to expound on it. (p. 844) I'm sure he's covered it and she won't expound on anything more than is in the notes.

The Court: That's what she's limited to because that's all that was put down. It's the only way of knowing what she had discussed with the doctor.

Mr. Maglothin: Let me look at the Judge's order just briefly .... all right. Thank you.

By Mr. Maglothin:

Q Did you and Frank have a discussion about moving out to the trailer on July the 2nd?

A Yes, we did.

Q Okay. Was Frank somewhat upset about that?

A Yes. He wanted to do it right away.

Q Okay. Now what trailer are we talking about?

A It was the trailer that I owned before Frank and I were married.

Q All right. Now, did you and Frank go look at that piece of land and trailer that particular (p. 845) day?

A Yes, after—

Mr. Clinger: Objection, Your Honor. I have to ask to approach the Bench.

Mr. Maglothin: Judge, there's testimony in the record that they went out to look at the trailer.

Mr. Clinger: No, that's in his opening. We've got it here in my notes exactly what he said and here in her testimony it doesn't say one thing about them going anywhere.

Mr. Maglothin: That's the testimony in the record. They went out and looked at the trailer, from Bertha, they had gone out to the house and got the shocks and were going out to the trailer to look at it.

Mr. Clinger: I don't care what they did. (p. 846) We're going by the Court's order and asking it to be limited to, these are excerpts.

Mr. Maglothin: Well, Your Honor, I will withdraw the question and go on to something else.

The Court: All right, but for future reference, what does this mean down here?

Mr. Maglothin: She can testify about whenever they were discussing—

Mr. Clinger: No, she's limited and I'd ask for an *in camera* hearing on this, Judge.

Mr. Kelley: Well, we'll just introduce the notes. You're depriving her from testifying.

The Court: You-all are the ones that deprived her by submitting her to hypnosis. At this point, I don't know what the importance of whether she testifies to going out there or not, but the point (p. 847) is that you're going to limit yourself to what she recalled and told the doctor on the first session and I'm not going to allow anything further.

Mr. Maglothin: I understand that, Judge.

The Court: I don't appreciate the suggestion that I was preventing her from testifying to anything. I'm not.

Mr. Maglothin: Well. Judge, I'll make my record on it later on, but it was a point that was in there and I think I was entitled to ask her about it.

The Court: All right.

(Reporter's Note: Back within the hearing of the Jury.)

By Mr. Maglothin:

Q Vickie, without violating the Court's order (p. 848) about what you can testify to and what you cannot testify to, I want to bring you down to till approximately when Jeff and Frank were working on the van and that Jeff left—

Mr. Clinger: Object to that, Your Honor. She's not testified they were working on the van. In fact, she can't testify to that according to the order. I'm going to ask for an *in camera* hearing.

Mr. Maglothin: It's in the record. They were working on the van.

Mr. Clinger: I know what the other witnesses testified to. We're talking about what this witness is allowed to testify to. I'm going to object to leading and I'm going to ask for an *in camera* hearing so I can be sure that there is a good faith effort to comply with the Court's order.

(p. 849) The Court: Well, I don't understand why the order is so hard to understand.

Mr. Clinger: I don't either, Judge.

Mr. Maglothin: Judge, it's not.

The Court: The order is that she not be allowed to testify to things that she now remembers that she did not remember prior to being placed under hypnosis.

Mr. Maglothin: I understand that.

The Court: Now, that's the extent of the order.

Mr. Maglothin: I understand that.

The Court: And I'm going to enforce that order.

Mr. Maglothin: I understand that, Judge.

The Court: All right. Now, is what you're now asking her included within the parameters of the notes that were made and the testimony that was given at the prior hearing?

Mr. Maglothin: I have got to get her from (p. 850) one point to another. I don't know how else to do it except read Betty Back's notes to her.

The Court: Well, I don't care. It's your lawsuit and you can try, but I'm going to enforce my order.

Mr. Maglothin: I'm trying to get her from one point to another.

The Court: Well, the court order is she will not testify to matters she did not relate to the doctor in the first session, and the best evidence we have of that since it was, since she was placed under the hypnosis that there, that a verbatim transcription of what she said was not made, the best evidence we have is what the notes that Dr. Back took and the testimony that Dr. Back gave at a prior hearing (p. 851) and that's what we're going to be limited to.

Mr. Maglothin: I understand that, Your Honor.

Mr. Clinger: If it please the Court, we have taken, in anticipation of the problem that might develop over this, we do have each and every reference, we have the same from the notes and we have every reference made by the, Dr. Back in her testimony by page number and

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we would be more than glad to submit those in lieu of the testimony if they have some difficulty in following the Court's order.

The Court: Well, I can't tell them how to try their lawsuit. Let's proceed.

By Mr. Maglothin:

Q Now then, you recall going to see Dr. Betty (p. 852) Back?

A Yes, sir.

Q And what was the purpose of going to see Dr. Betty Back?

Mr. Clinger: Objection. That's strictly outside the parameters of what we're doing here. She's allowed to give certain testimony. The Court has defined what the testimony is. Whether she went to Dr. Betty Back at their own request is something outside the scope of this right now.

Mr. Maglothin: It's been brought out in front of the Jury and I think she's entitled to testify as to why she went to Dr. Back.

Mr. Clinger: I object, Your Honor.

The Court: Sustained. It's not in the issue of this case.

Mr. Maglothin: I'd like to make a proffer on it. If she was allowed (p. 853) to testify, the witness would testify that she went to Dr. Betty Back at the request of trial counsel in order to submit herself to hypnosis so that she could remember certain details about the inci-

dent on July the 2nd, 1983. If she in fact was hypnotized, then the result of her post-hypnotic session was that she was able to remember certain details about the death of Frank Rock which she did not previously remember before. Counsel submitted that the failure to allow the witness to testify is a violation of her constitutional rights to testify under the Arkansas State Constitution and the due process clause under the U.S. Constitution.

(p. 854) (Reporter's Note: The proffer by defense counsel was out of the hearing of the Jury.)

By Mr. Maglothin:

Q Okay. Vickie, there's been testimony in the record concerning. that you went into the beauty shop while Jeff had left the apartment, okay? Are you with me? You know where I'm at?

A No.

Q On July the 2nd, 1983, Jeff left your apartment, yourself and Frank's apartment?

A Yes.

Q Okay. You went into the beauty shop and laid down?

A Yes, I did.

Q All right. Now, without violating the Court's order about what you can testify to and you can't testify to, tell this Jury what happened then?

A I went in and laid down in my beauty shop and I heard Jeff drive up and I heard him come in and the

television was on and they were watching HBO and I heard another car drive up—

(p. 855) Mr. Clinger: Your Honor, I'm going to have to object. Number one, there's no mention of HBO tv, Jeff driving up, no mention of another car. I'm going to ask for an *in camera* hearing, Your Honor. I think it's a flagrant violation of the Court's order. It's putting us in a position of appearing to be restricting the witness from testifying when the matter that brought about the violation were done solely at the instance of the defense counsel. We resent it and I think it's creating a bad picture to the Jury.

The Court: Mr. Bailiff, take the Jury please.

(Reporter's Note: The Jury out of the courtroom.)

The Court: All right. Mr. Clinger?

(p. 856) Mr. Clinger: Your Honor, I would first ask the Court to inquire of these defense counsel whether they have taken steps to insure that the witness has been instructed to give testimony restricted only to the comments that were attributed to her by Dr. Betty Back. I'm entitled to that and I think the Court should be, too, because so far I can't find any indication that they have tried in any way to limit her or limit the testimony or prevent her from making these outbursts in an effort to confuse matters and disrupt this trial.

The Court: What about it?

Mr. Maglothin: Judge, the problem is getting from one point to another. You know if you just read the notes that are in the (p. 857) record, it states that she and her husband were discussing moving out to the trailer she

previously owned, he was set on moving out to the trailer, she felt they should discuss it, she became upset and went to another room to lay down, the brother came in and left, she came to eat some pizza, he wouldn't allow her to have any. The problem is getting from one point to the other point. You know, Betty Back's notes are taken, they're not even complete sentences, Judge. You know we have been limited to the matters that are in this discussion about the trailer, what she was doing when she come out, about the pizza, and—

(p. 858) The Court: Well, of course, the problem is raised by the fact that no transcript was made of that first interview with Dr. Back.

Mr. Maglothin: Except her notes.

The Court: Yes, so that's what I'm limited to. I realize that's got to be, there's got to be some reasonable latitude in setting the context, but to introduce—I take it from what I have heard here you're introducing things that she simply said at that time she did not remember?

Mr. Maglothin: No, Sir, no, Sir. The whole essence of Dr. Back's testimony at the last hearing and it was, the fact she couldn't remember what she did with the gun, couldn't remember how the gun went off, number one, and what she did with the gun, number (p. 859) two. The post-hypnotic suggestion brought that out through two sessions of hypnosis. Now she remembered all of this. She didn't, you know, she did not have a blank on this part of it. Two, the main points were the fact, how the gun went off and what she did with the gun.

The Court: That's your view of it. Now, the point is that the Court's order was intended to try to repair the

damage done by you people putting her into hypnosis without considering the effect on this trial, and I realize you did that in good faith but that's where we're at, so what I have got to do is try to figure out a way for this thing to go forward and let her testify but let her (p. 860) testify to things that she remembered at that time because anything after that was the result of a post-hypnotic suggestion which I will not permit.

Mr. Maglothin: Judge, I think I can make a proffer at this point and let her testify as to what happened up till the time of the shooting and then what happened, what she remembered. No one knows what she remembered after the post-hypnotic session which we haven't had testimony on. That's what's over in the last hearing with Dr. Back or in this trial.

The Court: Go ahead.

Mr. Clinger: Your Honor, first we'd like to point out that at the hearing we had on this hypnosis business after, and (p. 861) I'll also point out that we had never been provided with a transcript of what went on or a report or anything else from the, Dr. Betty Back. We had to get them that day only because we had subpoenaed them. I point out we had a hearing, first off, the State had a copy of two pages of notes she took and that was it. Although the Court was well aware of the case law going back to 1971, it says they ought to be recording these post pre-hypnotic sessions, interviews. She didn't. They chose to do it that way. We went to put Dr. Back on to ask questions, they put her on the stand, we cross examined her and gave her every opportunity in the world to expound on, (p. 862) elaborate on, drag out, flush out, what-

ever, anything that was said to her in that pre-hypnotic interview. I gave her every opportunity to expand, and then after that hearing we, at the State's expense, had a transcript made and gave them a copy so they would know exactly how far Dr. Betty Back went and also they have made no attempts, there have been no attempts made by the defense at that time to put the Defendant on the stand and try to rebut anything that Dr. Betty Back said or, well, which I really remembered that or this. It's my understanding that this Court ordered, after hearing that extremely damaging post-hypnotic suggestion that (p. 863) she be able to remember everything, that there would be no gaps whenever she looked into her testimony. The defense attorney, the Court elicited it, the cat was out of the bag, the danger was there, and that's my understanding of why you ordered she would be limited to being able to testify to those things that she told Dr. Betty Back as evidenced by Dr. Betty Back's notes and the Doctor giving testimony at the hearing. Now, they're going, trying to, and I still don't have an answer, I don't believe the Court has an answer, to whether these defense attorneys have instructed or worked with this witness to make sure she, you know, (p. 864) she's bound by the notes or the testimony, which we don't have an answer to, and I think they need to, an answer to before we can go back in and bring the Jury in, instead of me bouncing up and down like a yo-yo.

Mr. Maglothin: Judge, on Page Eleven, Lines Twenty-three to Twenty-five, she tells the Court what the problem was, she couldn't recant, remember how the gun went off or what she did with the gun. Now, these general matters about what they were doing that day, she remembers that.

The Court: Who says so?

Mr. Maglothin: Well, the witnesses have testified—

The Court: Dr. Back didn't say so.

Mr. Maglothin: She says right here she (p. 865) couldn't recant, remember how the gun went—

Mr. Clinger: That's Dr. Betty Back saying what Mr. Putman told her, not anything this witness told her. That's her charge from the defense attorneys. I also point out, Your Honor, to counsel that Dr. Betty Back had no problem getting from one point in there to, back to another in the history, moving around from one place to another in the service, her previous marriage, what had gone on in that marriage, how many times she had been struck or beaten or slapped by her first husband. They had no problem going through the notes, but there is a problem that they have created, and we're (p. 866) going to insist that the Court's order be enforced. I'm sorry that it isn't working out so she can speak more about this evening. I believe the Court's order is black and white.

The Court: Well, I think it is, too, and my intent in the order is very clear. All counsel knew what my intent was at the time, there wasn't any question about the wording of the order, and so I'm going to stick with it. Now, Mr. Maglothin, if you need some time to talk to your client and explain to her what the limits are, I'll give it to you, but we're not going to have this same sort of thing going on that we just had.

Mr. Maglothin: I understand, Your Honor, (p. 867) and I will stick to it, but I want to make a brief proffer while the Jury is out.

The Court: Go ahead.

By Mr. Maglothin:

Q Now Vickie, go ahead and for the record, the Court has ruled, of course, that you are limited to Dr., what you told Dr. Betty Back in the pre-hypnotic session. Do you know what I'm saying?

A Yeah.

Q All right. You go ahead and tell the record, for the record, what happened that day.

Mr. Clinger: Objection to this. He wants to make a proffer into the record.

The Court: Your objection is out of order. Let him go ahead.

By Mr. Maglothin:

Q Go ahead.

A You want me to—

(p. 868) Q Speak up.

A Start from when we went out to the trailer?

Q Yes, ma'am. Go ahead.

A Well, we, went out to the trailer and looked at it and we talked about the different things that had to be done to the trailer before we could move out there and then we went to his mother's house because she had called and said the shocks were at her house, so we went to her house and Frank got the shocks from her and told me to write her a check for the shocks, so I wrote her a check, and Frank, Frank's daddy told Frank that—

Q Okay. You don't have to go into hearsay. What happened after you went and got the shocks and stuff?

A Well, we were there for not very long, I guess it was about thirty minutes or so.

Q Where did you go after that?

A We went back to the apartment.

Q Okay. What happened then?

A And Frank and I, we, we got there, I told him I would change my clothes and go help him put the shocks on.

(p. 869) Q Okay.

A And I started to change my clothes and he started in about his brother who showed up and so I told him that he knew his brother wasn't going to show up because he never did unless he needed money or something and I got my clothes changed and started out and Jeff showed up and so Jeff went out to help Frank change the shocks and they came in a couple of times to get beer and go back out or whatever they were doing and I was doing the laundry at the time and so I fixed myself a drink and then Frank and Jeff came in when they got through changing the shocks and they locked the shop up and everything and they set down and had a couple more beers and I was watching television and Jeff left about, oh, I don't know, maybe six o'clock.

Q Speak up just a little bit so Ken can get everything.

A And then he, we, he left, Frank told me he was coming back for pizza and Saturday was usually Frank's night to cook so I just figured we were going to have Frank's pizza but he told me they were going to order and

that Jeff was (p. 870) going to pay for half of it so I told him that he knew that Jeff wasn't going to pay because Jeff was broke, that's the only time Jeff ever came over was when he was broke, so Jeff showed back up but before he showed up Frank and I had discussed about how my little brother was and—

Mr. Clinger: I guess I have got to reserve my right to hearsay.

The Court: No, it's just a proffer.

By Mr. Maglothin:

Q Go ahead, Vickie.

A And when I heard Jeff's car show up I just went into another room because I didn't want to see Jeff.

Q Is that the room in the beauty shop area?

A Yes, that was in the beauty shop.

Q How long were you in that room?

A About two hours.

Q Okay. When you came out of that room, was Jeff present?

A No, Jeff had already gone.

Q Any time that you were in that room while Jeff (p. 871) was in the other room with your husband, did Jeff ever come into the room and say anything to you or did Frank ever come into the room?

A No.

Q Now then, tell the Jury or the Court and the record what happened when you came out of the room? Approximately what time was it?

A It was about nine.

Q All right. What happened then?

A Well, opened the door and I walked through and I asked Frank if I could have some pizza.

Q Okay.

A And he walked over to the bar and he slammed the lid down on the pizza.

Q Okay.

A And he said no, you can't have any, and he moved it around over onto the sink and so I told him that was fine and I'd go out and get something else to eat, down to the Susy Q.

Q Is that a restaurant or dairy bar?

A A drive-in like Dairy Queen.

Q What happened then?

A Then I went to the bathroom and put my shoes on.

(p. 872) Q Okay.

A And I came back out and started to walk toward the door and Frank come up and put his hand here on my throat and threw me back.

Q Let the record reflect that the witness grabbed her throat. Okay. Go ahead.

A And threw me back to the bar.

Q Okay.

A And so I started out the door again and Frank come around behind me and hit me on the back and pushed me over to the wall.

Q Okay.

A And I looked down and saw the gun.

Q Okay. Where was the gun sitting?

A It was on the end table.

Q Are you talking about the .22 revolver?

A Yes.

Q All right. What happened then?

A Well, I picked the gun up and turned around and I sat down on the coffee table.

Q Okay.

A And I pointed the gun at the floor and told Frank, I said don't hit me no more and I got up to walk out the door and he was standing behind me and I reached over and took the (p. 873) door knob and started opening the door to leave and then Frank come from behind me and run over and grabbed my wrist and said I wasn't going anywhere and the gun went off.

Q Okay.

A And I saw him fall and I backed up to the bar and dropped the gun on the bar and I ran to the telephone to call someone, get someone to help him, and I dialed the operator and asked her to get an ambulance to, to 801 North Second and—

Q Settle down now, settle down now, just take your time.

A The police came and—

Q Okay. Wait just a minute. Settle down now, settle down.

Mr. Maglothin: Judge, is she going to be able to testify as to what happened after the police came or—of course, it's not in Betty Back's notes. It's obvious that she knows what happened after the police came.

(p. 874) The Court: Well, what do the notes say about that?

Mr. Maglothin: They don't say anything about it. I don't think Betty Back went—she wasn't concerned really with what happened after the police came, so there's not any reference to that. In other words, I want her to testify as to how she felt, what happened to her after the police came, the fact that she told numerous police officers it was an accident, what they did with her, what she did with the police.

Mr. Clinger: Your Honor, I don't know how this can be done. The post-hypnotic suggestion that was given in that she wouldn't have any gaps in her mind. From then on out, she remembers every little (p. 875) detail. I don't know when the effect of the improper post-hypnotic suggestion ends. It's my understanding under the case law once it's been shown that she was improperly placed under hypnosis and improperly given post-hypnotic suggestions such as the kind that was given in this case, that's it.

The Court: Well, the problem is, Mr. Clinger, that all of the case law you have got and you have seen were cases in which the prosecution put somebody under hypnosis for investigative purposes and then a post-hypnotic suggestion was given and the result of which was testified adversely to the person—well, that's an entirely different situation than (p. 876) what we have got here and I'm dealing with an area, well, there's no law in Arkansas on it and very little in the United States in any instance

where the Defendant has been placed under hypnosis, and although there's some difference between the two the fact remains that it's just as, it's just as wrong for the Defendant to testify to things she didn't remember voluntarily as it is for any other witness and that's why I ruled the way I did. Now, I don't know, as a practical matter, I have no way of knowing other than by Dr. Back's testimony and her notes as to what this witness remembered after the fact. My memory of what Dr. Back testified (p. 877) was that at the first instance Ms. Rock didn't remember hardly anything, that was a matter of—well, she had suggested it was a matter of sort of retrograde amnesia which very often happens, so I don't see how she can testify to things that she supposedly remembers after the fact if in fact she did not remember those at the first session, that's the thing that's got me buffaloed.

Mr. Clinger: If it please the Court, I understand that most of the case law has to do with prosecutors or the State doing this sort of thing, but I just need to point out that the defense attorneys were well aware of all the pitfalls that came down in (p. 878) those cases. In fact, there was testimony at the hearing that they were fully aware of those things and just chose to ignore those guidelines—

The Court: Well, that may well be, Mr. Clinger, but that doesn't have anything to do with the efforts of the Court that the truth be brought out, and that's what I'm going to see to if I can possibly do it. Now, we have got the problem because of their having done this and I have just got to find the best way through the maze.

Mr. Clinger: Your Honor, when I remarked about their violating the guidelines, the reason I'm bringing that

up is because as I understand the current thinking as brought out by, in (p. 879) fact, I believe admitted to by Dr. Betty Back, certainly by the authorities she recognized, the big problem is, here is that improper use of hypnosis prohibits the other side from being able to carry on an effective cross examination and I think that's what this whole thing is.

The Court: Well, that's the biggest worry I have had all the way through and I said so when I made my order. Let me see those notes again of the first interview.

Mr. Clinger: Here are her notes. These are excerpts, Your Honor, and here's the testimony. Your Honor, there are two second pages on what you are reading on because the bottom line was cut off.

Mr. Maglothin: I don't have any problem (p. 880) with that one.

(Reporter's Note: After the Court read the documentation.)

The Court: Now, Mr. Clinger, what is it that you say of this testimony so far that is not fairly included in the notes of Dr. Back?

Mr. Clinger: A whole bunch, Your Honor. Going out to the trailer, that's not included in any of those notes, looking at it, that's not in it, going to the mother, that's not in it, getting the shocks, writing the check, going by the house for thirty minutes or so, going to help with the shocks, all of this stuff about Christmas, of the brother, all of that. The only thing in the notes about the brother is that the brother (p. 881) came and went after she had gone off pouting because they were fighting over the husband's desire to move

out to Avoca. There's absolutely nothing whatsoever said anywhere in those notes or Dr. Betty Back's testimony that there was ever any quarrel or fighting or argument or hard feelings or discussions at all about either of their brothers, that's complete fabrication as far as these notes are concerned, none, and this business about his brother being a deadbeat, that never showed up, and she just got through testifying to that, none of that is in here. The boys coming in and out for a couple of drinks and her fixing her a drink, I believe she says that in the notes, not of drinking but (p. 882) she wasn't intoxicated. She doesn't limit either one of them, Jeff or her husband, to a couple of beers, that's not, there's nothing in there like that, it just says here "husband was drinking that night", I believe, and it also says the brother came and went. It doesn't say anything, let's see, I understand from the note, it doesn't say anything about who was going to get the pizza or how it got there, it just simply says she said the brother left and came back and that they ate pizza, ate some pizza and her husband wouldn't allow her any. She doesn't say anything in those notes about Saturday being Frank's day to cook or anything about arguing (p. 883) about Frank, about whether the brother was going to pay for half the pizza. She says they had a fight about the little brother, that's not in here. She didn't want to see Jeff, that's not in here. They wasn't in the room for two hours, that's not in there, that Frank never came into the room, that's not in here either, either one of their testimony or in the notes. It says about him choking, she doesn't put any time reference in there, it has, says came out and said she wanted to eat some pizza, wouldn't let her go out and get something to eat, it doesn't say anything in here about the Susy Q or anything, that the husband wouldn't let her leave, that (p. 884) the husband

smashed her up against the wall and end table with the gun on it, she, that they were night watchmen for the business, picked up the gun and she said she didn't want him hitting her again or any more, there's no mention about all this business. Now she's filled it in saying that she went to the bathroom, none of this business about he first pushed her into the bar, none of that, nothing about chasing her down from behind and striking her in the face. Not only is it not in the notes, but in the testimony, I asked Dr. Back time and time again whether she had any idea how the gun went off or how he hit her or if there was any testimony about him (p. 885) pushing her or throwing her against anything in any way and Dr. Back said no, no, no, if she had said that she would have written it down, and let's see, shoving the pizza over from the table top to the sink, that's not in there, and then she now is testifying to slamming the lid down on the pizza, that's not in there, sitting on the coffee table, that's not in there, pointing the gun at the floor—let's see, she didn't say it to Dr. Betty Back. Denny Roles said she told him that she pointed the gun at the floor getting up to walk out the door. All it says is, she says is she picked up the gun and stated she didn't want him hitting her any more, he wouldn't let her out the door, slammed her up against the (p. 886) wall and he fell and died, none of that about pushing her against the door, hitting her, none of all of those details that have been filled in, Your Honor, and they were very important details, extremely important details. She says today I saw him fall and backed up to the bar and dropped the gun at the bar or on the floor, that's one of the critical points of this lawsuit and she has now filled in that and it's not mentioned one time anywhere in either the notes to Dr. Back or in the testimony of Dr. Back. We gave her an opportunity to flush it out in any way she

could and which she said she wrote down everything that the Defendant told her, (p. 887) I think, in fact, Your Honor, I concede, I would submit that ninety-nine percent of everything she testified to in the proffer is not covered in those notes or in the testimony from the hearing.

The Court: Well, I think that's probably a fair characterization because there's very little in these notes that, of details—

Mr. Clinger: I'd also point out, Your Honor, there's nothing in here that she ever, in fact that they were fighting and her husband used violence against her and picked up a gun, and one of the two police officers say they, she said she shot—three police officers say she said I then shot him. All those, she argues or there's argument (p. 888) to it that she can make because of the typewritten notes that one of the, one of the ones, one of the officers, that the gun went off. Other than that, there's no mention of pizza in any of the police reports, not one.

The Court: Well, I'm not concerned about all that, that's argument to the Jury. What I'm concerned about is what the parameters are of this, of her allowable testimony. As I see it, the only record that I have available ends at the time the gun went off and he fell and he died. As far as the Court is concerned, the ruling will be that matters that happened after that are outside of the realm of the Court's order, so that's where it will be cut off.

(p. 889) Mr. Maglothin: Judge, what about the general description up to the point he died? You know, if I am limited to just the exact words that are in Dr. Back's report, I might as well just read the report to the Jury.

Mr. Clinger: That's fine with me, Your Honor. Read the notes or read her testimony.

The Court: Well, we're not going to do that.

Mr. Clinger: Your Honor, they're at a hard spot but they put themselves there, and t allow the attorneys to go on with this confabulation that her own expert witness says is a true and obvious and real continuing danger—

The Court: Yes, I understand that. Well, I don't know how else I can say it. I have said it more times than I really think was necessary right (p. 890) now, but her testimony is going to be limited to the events and the things that are in these notes, and as far as embroidering upon them, I'm not going to allow very much of that but I also realize that she's got to be allowed to tell it in her own way as to what I think from the evidence is indicated that she remembered at the time and not what she remembers because of a post-hypnotic suggestion. Now, I think most of what you're arguing about is a tempest in a teapot. Again, I'm not trying the lawsuit, you people are, and I'm going to rule on it the way I think it ought to be but I'm going to try not to inhibit either one of you any more than I have to. I'm going to give her (p. 891) some reasonable latitude as far as describing what went on up to the time, in other words, up to the point of what they, where they were arguing and so forth and the events that happened, she describes in here to Dr. Back, what happened as she remembered it at that point up to the point of the incident itself. I don't see any problem with that. I don't think that she ought to be permitted to testify to characterizations of other people because it isn't included in here, so what I'm saying is that all this business about the no-good brother is out because it hasn't got anything to do with this and it

doesn't have anything to do with what she told Dr. Back, (p. 892) As far as going out to the trailer and so forth, I fail to see what the importance of that is either way. As to what she said, I don't see a big problem about that because Sergeant Roles has already testified to it.

Mr. Clinger: Your Honor, the Jury may not believe Sergeant Roles. They have got the Defendant up here testifying and now I'm afraid it's beginning to fill in some details. I'd like to make specific inquiry of the Court, as the Court can see from the notes—

The Court: Well, you can make inquiry of any witness on the stand, but you're not going to make inquiry of the Court.

Mr. Clinger: I'm just asking for a clarification on your ruling.

(p 893) The Court: Well, it's been pretty clear, I think.

Mr. Clinger: When you say you will allow her to describe the events leading up to the shooting, am I, can I take it then she's not being allowed to, she will not be allowed to describe where she was pushed, where his hands struck her, what wall she hit, or any of that business? The reason I bring it up, Your Honor, Dr. Back was specifically asked by me several times during the testimony if any of that was ever done and, it, and she said it was not. I even asked her if she ever handled it and she said she did not, so now to allow her to describe the fight scene over at the bar and one of the doors and the wall, it is (p. 894) all, I don't know the scope of that.

The Court: Uh-huh. Well, I think that's essential to the issue and I think that you certainly can cross

examine her on all that. I realize the problems, problems. That's why I made the ruling I did, but the notes, the notes of Dr. Back include characterizations of what happened when the, when she picked the gun up. Well, I'll give you fifteen minutes, Mr. Maglothin, to talk to your client and make certain that we don't get back into the sort of things we did before. I realize there may still be some problem, but I'm going to enforce my ruling.

Mr. Maglothin: Your Honor, I can go ahead, with the Court's permission, (p. 895) and make my proffer into the record on the remainder of the proffer. I can do it faster than the witness would.

The Court: All right. Well . . . .

Mr. Maglothin: If allowed to testify, the witness would also testify that Frank Rock, when he walked back in there, he shoved her up against the wall, he choked her, she had never seen him act like this at all. It was completely out of character with his behavior, that she, the way she picked the gun up is that she had her right thumb on the back of the hammer of the firearm and did not have her finger on the trigger. She had her finger, it would be the pointing finger, right pointing finger, on the side of the (p. 896) trigger of the firearm, that when he jumped in front of her at the door that he grabbed her hand and grabbed her arm with either one or both of his hands and the firearm went off. She would further testify that she has not had any experience with firearms, that she knows the difference between a single action and double action firearm that she was trying to be careful in that she knew that the firearm would not go off unless it was cocked. She would further testify she was fearful

of Frank Rock and merely trying to leave the apartment to get away from him. After Mr. Rock had been shot, the police arrived, that she told all the police officers that it was an accident, that she (p. 897) also tried to call Mr. and Ms. Rock, that the police took her to the police station, that she cooperated with them fully in giving them statements and told them that it was an accident the entire time. In cooperating with the police, she allowed them to take pictures of her, that she never told the police that she had any marks on her, and when requested to take nude photographs of her, she cooperated to that extent and allowed the police to take nude photographs of her. Again . . . . is there anything else?

Ms. White: No.

Mr. Maglothin: We would like to also proffer, and I assume it would be part of the record, Your Honor, (p. 898) the testimony of Betty Back from the last hearing and also the notes of Betty Back.

The Court: Yes, it will be included in the record.

Mr. Maglothin: And if you would allow me fifteen, Your Honor?

The Court: All right. We'll be in recess fifteen minutes.

(Reporter's Note: After a recess.)

The Court: Go ahead and do what you were doing.

Mr. Maglothin: If the witness was further allowed to testify, she would testify that the only thing that was refreshed by the hypnosis—in other words, anything that she's remembered after the hypnosis and post-hypnotic

suggestion was what she did with the gun after Frank Rock was shot.

DEFENDANT'S EXHIBIT 8

(p. 899) PROCESS NOTES

Name Rock, Vicki
Patient 3041

9/27/84 34 yr old w-9—referred by Bill Putman.

PP: Pt charged [with] manslaughter of husband July 2, 1983

Hx PP: Pt states she & husb. were discussing moving out to a trailer she had prev. owned. He was "set on" moving out to the trailer—she felt they should discuss. She bec[ame] upset & went to another room to lay down. Bro. came & left. She came out to eat some of the pizza, he wouldn't allow her to have any. She said she would go out and get [something] to eat he wouldn't allow her—He pushed her against a wall an end table in the corner [with] a gun on it. They were the night watchmen for business that sets behind them. She picked gun up stated she didn't want him hitting her anymore. He wouldn't let her out door, slammed door & "gun went off & he fell & he died" [pt looked misty eyed here—near tears]

Personal Hx: Born in OK raised "all over" F was a traveling salesman. In Tulcaage 2-12. All over Miss under age 15. Moved to Ark & lived [with] [grandparent] for awhile. Moved to Mo. shortly—Then to Rogers, Lowell

& Rogers. 9 schs from 6th grade under grad H.S. in Rogers, H.S. Grades "not good, but not bad" 82nd in class of 187. After H.S. went to Ruths Beauty College, then worked Emmerson Elect., then joined Navy for a yr. Married 1st hus age 21 for 7 yrs. No children. Married deceased husband

* * *

EXCERPTS FROM DEFENDANT'S PROFFERED EXHIBIT NO. 9

* * *

(p. 907) Q Are you familiar in your readings of any of the publications put out by any of those folks, including Dr. Martin Orne, of any of the, their (p. 908) concerns about how, on the question of realiability of hypnosis?

A Yes.

Q And what some of the safeguards they have proposed to be followed?

A Yes.

Q Before hypnosis is used either with witnesses or suspects?

A Yes. I'm familiar with those.

Q Okay. When you undertook to hypnotize the Defendant in this particular case, were you aware of the suggestive guidelines by such people as Martin Orne?

A Yes.

Q Did you attempt to follow those?

A Yes.

Q Would you tell the Court what those suggested guidelines are?

A The first one is that the person by either a clinical psychologist or a psychiatrist trained in the use of hypnosis. The second one is that the person who is to do the hypnosis not to get facts from any of the law enforcement, legal, or other persons involved. Three, that the person, the person who's going to (p. 909) do the hypnotism to get a detailed report from the person to be hypnotized to determine what their memory, present memory was, it's situation is. Four, that the person who is to hypnotize the subject not be employed by or under obligation to anyone involved in the investigation, that the hypnotic session itself be recorded either by video or audio recording, and that no one be present at the time of the hypnotic session other than the subject and the clinician. Is that six?

Q I think so. After one of the, fifth one, I believe you said it was the session be either videotaped or recorded otherwise?

A Yes.

Q And what was the sixth one?

A That no one be present other than the clinician and the subject.

Q When you, when you talked with Mr. Putman over the telephone?

A Yes.

Q And he made you, he made his request?

A Yes.

Q I believe he told you he was wanting, he thought this session was necessary in order (p. 910) to enhance or, the memory of his client?

A Something similar to that.

Q Well, okay. I don't want to put words in your mouth. What was it?

A I don't remember the words verbatim, so I'm not sure if he used the words "enhance memory" or—

Mr. Putman: Your Honor, I believe she testified she has notes which are made more or less contemporaneous with our conversation. Perhaps that would refresh her memory as to what was said in that respect.

By Dr. Back:

A All the said to me is he wanted the details of the night that her husband was shot.

Q I was also going to ask you, are you a member of the American Psychological Association?

A Yes.

(p. 911) Q Are you familiar with their journal, "The Monitor"?

A Yes.

Q All right. Do you subscribe to it?

A Everyone who's a member of the American Psychological Association gets that one free.

Q Okay, okay. Have you had a chance to refresh your memory from your notes from your conversation with Mr. Putman?

A As I said, what he said to me was that he wanted the details of the night that her husband was shot.

Q All right. Did he explain why he thought it was necessary that she undergo hypnosis?

A I don't believe that he said that it was necessary that she undergo hypnosis. I believe he asked me if I would be willing to hypnotize her to see if I could help her remember the details of the night.

Q Okay. Did he indicate—he indicated then she was having some recall problems or some trouble with her memory about the exact details?

A Right. That she couldn't recant, remember how the gun went off or what she did with the gun.

(p. 912) Q Okay. In your discussions with Mr. Putman, did you talk about the dangers of, or the pitfalls or problems that could possibly arise from the use of hypnosis from somebody such as a suspect in that case?

A Yes.

Q Did you talk about the, setting up any, making sure you followed particular procedures?

A Yes. I told him that there was a lot of controversy in regard to this and that I didn't want him to tell me any more details, to stop right there, that was one of the guidelines, and I did mention to him there was controversy in the area and he said he was aware, he, and I said with that, if you're aware of that, yes, I'm willing to hypnotize the subject.

Q Okay. I believe you said you saw the Defendant the next day?

A That's correct.

Q And she came to your office by herself?

A No, Mr. Putman brought her to the office.

Q Did you have a conversation with Mr. Putman and with the Defendant together?

A No, not at any time.

(p. 913) Q All right. He simply said here she is?

A He came to my office briefly, said hello, how are you, and he said that's Vickie Rock out in the waiting room. I said is she comfortable about this, does she have any apprehensive feelings about it, and he said not that I know of and I said okay, I don't want to know anything about it and just let me work with her and he said fine. We went back out and I got Ms. Rock and he left the office.

Q Okay. When you began your interview with Ms. Rock, did you make any attempt to record your initial interview with her?

A I wrote down the notes of our conservation, which you have read.

Q I know. Did you record it in any way with a tape machine or videotape?

A No. I only record the hypnotic session itself.

Q Can you tell us why you didn't record your initial interview with her?

A Oh, it's just not customarily done. We don't usually record interviews. We just don't usually do it.

Q When you were talking with Mr. Putman the day (p. 914) before, did you-all discuss how vitally important

it is in light of the trend in the cases involving hypnosis that all reasonable steps be taken to record everything that the patient has to say before she enters into the hypnotic session, hypnosis session?

A Would you repeat that, please?

Q When you were talking about it with Mr. Putman the day before, did you discuss how important it is to keep an exact record of exactly what the witness or subject's or suspect, the patient has to say, what they can recall prior to the hypnosis session?

A I don't believe that I discussed that with Mr. Putman. I know I was going to take notes.

Q Okay. So he didn't say anything to you about the need to make sure that verbatim records were kept of everything she had to say prior to entering into the hypnosis session?

A No. Mr. Putman usually doesn't tell me how to do my work.

Q Okay.

A I think he knew that I would take verbatim notes of what she said.

Q How long did your interview with her last?

(p. 915) A Oh, I'd say about an hour.

Q You have shown us here what's been introduced into evidence, Defendant's 1, a one single sheet of paper that has handwriting on front and back?

A Yes.

Q Is that every word she said to you within the hour?

A I obviously cannot write down every word that someone says.

Q Right. That's obvious. I'm asking you does that paper include everything that she said to you during the hour?

A It's not every word verbatim that she said. It has quotes in there, pertinent parts were I tried to, try to write down verbatim the words she said.

Q Pertinent parts? You determine what were pertinent?

A Well, I think it's more pertinent when she talks about what happened the night her husband was killed, for example, than when I was taking a family history.

Q All right. And then I believe that after talking to her for an hour you then hypnotized (p. 916) her; is that correct?

A That's correct.

Q During the period that you were talking with her, did you satisfy yourself that she was willing to go through this hypnosis?

A Yes.

Q Did she understand the purpose of it?

A Yes.

Q Did she understand the purpose was to what? Try to enhance her memory of the details of the night her husband was killed?

A That's correct.

Q Was she, was she—did she state to you that she had problems remembering all the details of it?

A I don't remember if she said she had problems. She just, I told her to tell me what she could remember and she told me what she could and she said that's all I can remember.

Q Okay. Did she, so she was totally aware that she was being hypnotized for the purpose of refreshing or enhancing her memory for the purpose of trial preparation; is that correct?

A Yes.

Q To assist her attorney?

(p. 917) A Yes.

Q Would you say that she was aware that she was there in order to help in that trial preparations?

A Was she aware she was there to help?

Q That her participation in the hypnotic session or hypnosis session was being conducted with her cooperation in an effort to help her attorney prepare her case?

A Yes, I think she knew that.

Q All right. Would you, would it be safe to say she was there trying to help herself?

A I think so.

Q Okay. And in other words, she was aware that it might probably be, she could remember things under hypnosis that might aid in her defense in the case?

A At this point, I feel like you're making me guess farther and farther. We didn't discuss that. You're just

sort of taking me farther and farther away from the facts of what we talked about and I don't want to guess what she thought at that point. I don't know.

Q Well, you stated you, a few minutes ago you were one hundred percent or in your belief (p. 918) that she was under the influence of hypnosis during the session, that she was a good subject?

A That's my opinion. She was a good subject and I felt she was hypnotized.

Q Does that require you somewhat to look into her mind a little bit?

A I didn't look into her mind; no. I observed her behavior and that's how I determined that she was a good hypnotic subject.

Q Okay. And that's how you determined whether she was being honest with you?

A I didn't say that I determined whether she was being honest with me.

Q Do you know whether she was being honest with you?

A No, I don't.

Q In fact, isn't it a fact that the leading experts in this area are of virtually unanimous opinion that people who even under the influence of hypnosis are capable of manufacturing statements or leaving out, even out and out fabricating?

A Yes, that's true. You have to keep in mind this happens with subjects that are not (p. 919) hypnotized, also.

Q Obviously.

A So there's really no difference in that regard.

Q I can see that, in other words, there's no truth guarantee with hypnosis?

A Certainly, not at all, no truth guarantee.

Q Now, I believe you said that—well, let me back up a little bit. Would you agree with the idea or with this statement that the validity of the hypnosis session depends a great deal upon the relationship that is established between the hypnotist and the patient?

A Yes. I think there has to be a certain amount of trust, I think the patient has to trust the hypnotist to allow this to happen.

Q All right. Lots of times in these sessions or, I'm not talking about just the Defendant in this case, but doesn't the patient, if that, if that trust is developed, doesn't the patient sometimes have a strong desire to please the hypnotist?

A That's true. That's why you have to be very careful that you don't lead the subject in any way or suggest anything to their memory.

(p. 920) Q Right.

A Because the person is very suggestible during that time.

Q Right. Isn't that one of the definitions of hypnosis is the state of heightened suggestibility?

A Yes, it is.

Q When a person is extremely subject to suggestions made by the hypnotist?

A That's why it's very important that the, who's doing it be careful not to introduce information or to lead the person into things that they might fantasize and later think to be memory that are not. On the other hand, a person who's being questioned directly, very directly under a state of high emotional state, say, for example, a person such as Ms. Rock were being questioned by the police department under a lot of pressure and a lot of detail, that could also confuse her memory much more so than a hypnotic session could.

Q Could you agree with the idea that some times a hypnotist prior to the actual hynotic session itself can, by words or actions, make suggestions to the patient.

(p. 921) A That's correct.

Q Even unconsciously?

A That's correct.

Q And I guess once again you would say that that's why the expert has to be very careful to make sure they don't do that sort of thing?

A Yes.

Q Wouldn't it be desirable in order to prove to this Court, let's say today, that you didn't do any of that business during your pre-hypnotic session, that you didn't unconsciously make suggestion to her or lead her or do things that might create in her a feeling that you had certain expectations that you wanted her to meet and you would be disappointed that she doesn't, wouldn't it have

been of value to have a, let's say a tape recording of that entire session?

A It may have been. We don't have recordings of that.

Q Right. Wouldn't it have been, wouldn't it have been nice if we did have something like that?

A That would be nice.

Q All right. Do you know of any experts in the (p. 922) field who suggest strongly that, that in cases exactly like this that the pre-hypnosis session be recorded and preserved just like the hypnotic session itself?

A Well, let me say this. Maybe you and I are confusing terms a little bit. What I would call a pre-hypnotic session and history gathering interview, I see a, two different things. My understanding of the pre-hypnotic session is just talking to the patient, getting a, them relaxed right before you hypnotize them. I don't know if I would call the pre-hypnotic session itself just a history gathering.

Q Do you know of any experts in the field who advocate that in situations where a person is going to undergo memory enhancing hypnosis that that, an expert who advocates that every single bit of contact between the hypnotist and the patient be preserved by videotape or recording?

A I'm sure there are people who advocate that. What I have tried to go by are the standards in the Hurd case, of the six standards that regularly are felt to be sufficient in most states. Most clinicians can't afford video (p. 923) equipment, the kind of things that, you

know, where you can record everything that happens from the moment that a person walks in your door, and I wouldn't think it's typically done. I think typically the safeguards that I used are considered to be sufficient.

Q Did you discuss with Mr. Putman the necessity for videotaping any part of the hypnotic session?

A No. I told him I would use audiotape.

Q And he didn't suggest to you that videotape would be preferable?

A No.

Q Okay. I believe that—now, when did you turn the recorder on? What was going on when you turned the recorder on?

A We were, we moved to another room. I have a room that has a couch in it that's more comfortable. It's a smaller room. I can adjust the right lighting in it. I turned it on. We went in that room. It was on from the time I settled her down on the couch and got her comfortable and from the time we went in the room.

Q So the tape has the entire hypnotic session (p. 924) on it.

A Yes.

Q Including placing her under hypnosis?

A Uh-huh.

Q And I believe you said that during the, in your opinion although people can fake hypnosis, which they can; is that correct?

A Yes.

Q In fact, aren't there some leading experts who say that even the best hypnotists can be fooled?

A That's true.

Q When you say that you're a hundred percent sure that she was not faking—

A I don't know that I ever used the word "a hundred percent". I think I said—

Q Maybe it was absolutely.

A Yeah. I feel certain, you know, that she was hypnotized.

Q But in light of, but you recognize you could be wrong?

A Yes, sir.

Q And she could have faking it?

A Yes.

Q Okay. And then I believe that you hypnotized (p. 925) her and then you interviewed her?

A I what now?

Q Interviewed her or—

A Well, I hypnotized her and then I used a regression technique where I took her back through some older memories to see if she were able to do that kind of thing and then moved forward up to the night or the time of the shooting of her husband.

Q Okay. How far back did you take her?

A I believe I took her back to when she was in school, I believe it was the earliest, and I don't recall if I said what grade or, but school, and then to her high school graduation, I remember we went to that, and then I went to when she joined the Navy and when she got married and then the night of the incident.

Q Okay. During the session when you were going through your regression and coming back up to the date of the actual death of her husband, did she discuss martial problems they had had?

A No, not during, not during the hypnotic session; no.

Q Did she at some other time?

A I asked her about their marriage and there (p. 926) are notes in here about that.

Q Would you refer to them?

A Yes. She said that they got along fairly well, that he had never hit her. He had tried once when he was drunk, and that the night of the incident was the first time he had gotten rough with her, you know, shoved her, pushed her around, and that he had been drinking that night and that their problems in her, their marriage had mostly revolved around a drinking problem he had.

Q Okay. Did she mention any kind of drinking problem she had?

A I asked her about her drinking history and she said that she had, the last two years of her first marriage that she drank pretty heavily. She indicated that she had

drank moderately during the four years that she was married to her deceased husband and that she had been drinking the night of the accident.

Q Did she tell you how much?

A I asked her how much and she said not a lot, it's difficult to get exact amounts, she said she was not intoxicated, she had been drinking.

Q When you put her under hypnosis, was she later (p. 927) able to remember in detail how much she had to drink?

A I didn't ask her how much she had to drink.

Q You didn't think that was pertinent?

A That may be pertinent, but when you're hypnotizing someone you get the most accurate information by not asking specific questions but just letting them go through what they're seeing, some spontaneous type of verbalization that's—research shows that you get a less contaminated memory by using that process so I used that process for the most part. I did ask some detailed questions later on, but one of the problems that you will note on the tape is that it's very difficult to understand anything that she says. She's very upset, she's crying through much of it, and I couldn't understand her for a lot of it and it's just very difficult to understand what she's saying.

Q Did it ever get to the point where you could understand what she was saying?

A Just little bits of, and pieces.

Q When you said earlier that lots of times that police hypnotists don't know what they're doing or they don't know how to handle people if (p. 928) they get in a state of hysteria?

A Right.

Q So they go into, they use a different type of technique where they have them sort of disassociate themselves from the situation?

A Right.

Q As if they're looking at it on a tv or something like that?

A Yes, right.

Q Did you use that?

A I used that in different parts.

Q Did that work?

A Yes. She was able to do that. It calmed her down somewhat, but, you know, I used it at various times. Sometimes when she would get very upset I would resort to that technique. Lots of times I just let her cry. It didn't bother me, you know. I just tried to wait to see what would come of it.

Q When you said she's a very good subject for hypnosis, I have read somewhere that sometime people who are faking hypnosis act uncontrollable or sick or emotionally upset throughout the session; is that correct?

A Well, I haven't read that anywhere. I'm sure (p. 929) that people can fake that. I wouldn't say she was uncontrollable in any way. That's not what I meant to

imply, but she was upset. I think that it would take a very skilled actress to pull off what I saw. She was obviously upset, she was crying real tears and seemed to be in pain and involved in what was going on. I have hypnotized people that I felt sure were faking it and I have seen some pretty hysterical, dramatic-type of performances and I know what you're speaking of. That's not what I saw with her.

Q Okay. So I understand that under, when she was under this, under hypnosis in the first session that you did not ask her any direct questions; is that what you're saying?

A Well, I'm not sure that I didn't ask her any that time. I may have asked some but very few. The second time I asked more.

Q Is that why you had another session?

A Well, I don't know why I had another session. I just decided she was a good subject and I just decided that I would try one more time to see if we could get any memory of what had happened. As I said, you get the most accurate (p. 930) information by letting the person just talk.

Q I understand that.

A Okay. And then on the second and third sessions, you might try for more details.

Q Did you try for more details?

A Yes. On the second one, I asked more direct questions.

Q Did you ask her on the second one how much she had been drinking?

A No, no, I didn't ever ask her questions like that.

Q Wouldn't it be important? Doesn't alcohol sometimes have a, play a part in a person's having amnesia or having faulty memory?

A Well, a lot of things play a part.

Q Drinking isn't one?

A Drinking can be one, being very upset. I wasn't trying to determine why she couldn't remember. I was only trying to help her remember.

Q How much she had to drink wasn't important?

A It really wasn't part of what I was doing. No, it wasn't important to me.

Q Okay. How long was this first hypnotic session?

(p. 931) A Oh, I don't know. Probably close to an hour.

Q Okay. And then did you talk with her afterward?

A Yes.

Q And how long did you talk with her?

A Just briefly. I spent enough time with her to make sure she was okay, she was oriented, she wasn't confused, she wasn't upset, that she looked calm and settled down, I feel safe with her leaving the office.

Q Did you talk to her about what had gone on during the hypnotic session?

A No. I asked if she was comfortable, how she felt, that particular kind of thing.

Q Did she say anything to, different to you following the hypnotic session? Did you go over the story again with her, her recollection of the night her husband was killed after she came out from under hypnosis?

A No.

Q Don't you generally do that?

A No. I decided that it would be Mr. Putman's job. If she remembered anything, she could tell him.

Q Okay. So you didn't, at the conclusion you (p. 932) didn't go through her story again with her to determine if her memory of the incident was any different than it had been prior to the hypnotic session?

A No. I got through with the session, I felt clear that she didn't remember anything, there was nothing that I heard during the session that was different from what she told me during the interview.

The Court: We're going to recess for lunch. The court will take up again at one-thirty.

(p. 933) Q Dr. Back, I believe that you said, or earlier on direct examination that you made notes of your conversation with Mr. Putman when he called you on the phone?

A Yes.

Q Do you have those with you at this time?

A Yes.

Mr. Clinger: Your Honor, I'm going to move for the introduction of these with the idea they can also be substituted with a copy so she can get her original back.

Mr. Putman: I don't object, Your Honor.

The Court: All right. It's admitted. What's that? Number 2?

Mr. Clinger: State's 1, Your Honor.

The Court: All right.

By Mr. Clinger:

Q I believe you said that he told you as you (p. 934) have wrote here, can't remember how gun went off and what she did with the gun?

A I'll have to see.

Q Okay.

A Yeah, that's—

Q Okay. Can't remember how gun went off and what she did with the gun.

A With the gun; uh-huh.

Q What does that say?

A At the end of the conversation, I noted thing that he told me in the beginning of the conversation before I realized exactly what he had wanted. I stopped, so I noted the things, the fact that I knew and those were the ones that I knew.

Q He had given you?

A Yes.

Q Such as after walks to the door?

A Yeah. I remember him telling me she didn't know what happened after she walked to the door.

Q He's been drinking?

A Yeah, and that they got into a fuss.

Q Fuss?

A He showed her. He wouldn't let her have some (p. 935) pizza. Those are the only facts that I knew about it.

Q Okay.

Mr. Clinger: I'll move for its introduction and we'll make copies.

Mr. Putman: No objection.

The Court: All right. It's admitted.

By Mr. Clinger:

Q When you were, when you began this interview with her which I call a history gathering interview which you said lasted approximately an hour, when you made the notes?

A Yes, that's the same kind of interview we do on, on any new patient that comes into our office.

Q In this history interview, you also go over her version, what she could remember prior to the hypnosis?

A Yes.

Q You don't term that the pre-hypnosis interview?

A I would call that an interview such as I do (p. 936) with anyone who comes into our office. A pre-

hypnosis session to me would have to do with getting the person ready for the hypnosis, such as getting them comfortable, doing some relaxation procedures and that kind of thing.

Q Testing them to see how good a subject they're going to be?

A Yes sir. For example, a good example, the arm levitation and that sort of thing.

Q And I suppose you did that sort of thing?

A Yes, sir.

Q And that's in the tape recording?

A Yes.

Q When you were talking to her in this interview, in this history interview, did you tell her that, the areas that Mr. Putman had expressed concern about?

A No, I didn't.

Q Did you ask her—did you discuss with her this question of her not being able to remember how the gun went off?

A I'm not sure what you mean. What way?

Q Did you talk to her about how the gun went off?

A I told her to tell me all she could remember about (p. 937) the night of the incident.

Q Okay. So she told you how the gun went off?

A No.

Q She had no idea?

A No.

Q Did she later, during the hypnotic interview or the hypnosis session, remember how the gun went off?

A No.

Q And then you said after the hypnotic session you had no post-hypnotic interview with her?

A Not specifically about the incident. I did spend some time with her, as I told you, to make sure she was okay and comfortable. I didn't ask her. I felt that I knew what she had remembered because I heard it during the interview.

Q Right. What she remembered during hypnosis?

A Right.

Q Isn't it customary after they have talked about things under hypnosis, isn't it customary then to talk to them after that they have come out from under the trance to see what they remember, if their memory has changed any or changed, if she recalled the things they talked about (p. 938) during the hypnosis of if they can even recall what they talked, told you about before the hypnosis?

A I don't know if that's customary. The thing that is customary is to make sure that the patient is okay, that they're oriented and comfortable. I think it would have to do with the purpose of the hypnosis what would be customary.

Q Uh-huh.

A You know.

Q Let me ask you this: the purpose was to see if she could remember what she did with the gun or how the gun went off. Did you ask her those questions after the hypnotic session?

A I don't believe that I did. I may have, but I don't believe that I did because I felt sure that I didn't hear any new information, anything different from what she had told me in the history gathering.

Q Is it possible that sometimes after a person has been under hypnosis that even though they may not have recalled things or said things during the hypnotic session that afterward their memory may come back to, as to things (p. 939) that they heard?

A Yes, that's possible.

Q Wouldn't is have been important to see if that was the case here?

A Only a few minutes had elapsed.

Q How long was the hypnosis session?

A Well, it was about an hour, but the very last part of it had to do with the incident and she did not recall anything different so right after that was only a few seconds later. I wouldn't expect her to recall something different.

Q Okay. During the history session there, did you go over with her in detail exactly what had happened leading up to the death of her husband?

A I went over that with her as detailed as I could without asking detailed questions, which I did not want to do.

Q Even in the pre-history?

A Yes. As I pointed out to you, people who ask detailed questions such as policemen or people who are doing investigations that ask detailed questions elicits more information that is inaccurate than if you let a person spontaneously (p. 940) tell you something.

Q Whether they're under hypnosis or not?

A That's correct.

Q Did she tell you about an incident that occurred the weekend before the death of her husband in which her husband had threatened to leave her?

A No, I don't believe she told me anything about that.

Q Or that she threatened to commit suicide?

A No.

Q Did she tell you that she had ever had a problem of that serious nature before this evening?

A No. She told me that they were arguing or upset about moving to a trailer and that she felt they needed to discuss this and that he had seemed to be, I believe her words were "set on moving to this trailer".

Q Uh-huh.

A And that was something that they were upset about this evening.

Q So they were fighting that evening, fussing?

A Quarreling. They were arguing, I believe; yes.

Q Did she tell you how long the quarreling (p. 941) lasted?

A No, I don't believe she told me exactly how long that lasted.

Q Did she talk about his younger brother having been there?

A Yes, sir.

Q Was the quarrelling going on at that time?

A Yes, I believe it was.

Q The quarrelling had gone on all day?

A I don't know that she said it went on all day.

Q Did she tell you she had been drinking mixed drinks all day?

A She had been drinking.

Q Did she tell you what she had been drinking?

A I don't recall.

Q Okay.

A I think I would have written it down if she had.

Q Okay. Didn't matter to you whether it was hard alcohol or beer? Just didn't make any difference?

A The purpose of me seeing Ms. Rock did not have anything to do with me making any judgment about why something happened or if something happened. I tried very hard to limit what I was doing to the hypnotic session only.

(p. 942) Q What did she tell you happened then that led up to his death?

A What she told me—I might need my notes, I'd like to have my notes.

Q Well, do you have to have these notes to remember?

A I don't have to. I feel—

Q I mean the only question I have got is you said she talked to you about an hour and that clearly these don't have anything, everything she said.

A Right.

Q All right. Do you need to have these notes to refresh your memory—

A It would help me.

Q Okay.

A Okay. As I told you previously, she mentioned to me something about moving out to a trailer and that he was set on moving out to the trailer and that she felt they should discuss it more, she was upset about it, she went to another room to lie down. While she was in another room resting the brother came in and then he left and he either brought pizza or ordered pizza, somehow pizza was in the house. (p. 943) At that time, after the brother left, she came out because she wanted to eat some of the pizza and her husband wouldn't allow her to have any pizza and she said then she would go out and get pizza and he wouldn't allow her to leave the house.

Q Okay.

A Then he pushed her against a wall.

Q He pushed her against the wall?

A Uh-huh.

Q Did she describe to you how he pushed her?

A No.

Q You never had her act it out or anything?

A No.

Q Did she, did she say what portion of her body he pushed.

A No, I did not want to ask direct questions like that. Do you understand? That just elicits confabulation. I can't ask what part of your body did he push. That elicits more inaccuracies.

Q You mentioned the term "confabulation". Would you explain that?

A Right. Well, if you ask a person a lot of direct questions, they, they're trying to (p. 944) answer you so they tend to fill in the gaps.

Q Confabulation?

A They have pieces of memory and they will tend to fill in the gaps with things. I didn't want that, that to happen, so I only asked her to tell me what she remembered.

Q Okay. I assumed—

A I wrote down brief notes.

Q I assume if a person would confabulate while just in a normal, waking state or no hypnotic state, the danger of confabulation is even greater once they're in the hypnotic state; is that true?

A I don't know if that's true. I think it's less of a danger is the hypnotic session is done with safeguards. There is a great danger of confabulation of a person who is not hypnotized and is being interrogated. For example—

Q You have said that several times. Let me ask you, are you saying a person who might, who's the type of person who might confabulate during the normal waking interrogation or interview is less likely or is the same likelihood of his confabulating once he's (p. 945) under hypnosis? Are you saying that?

A I don't think you can make that comparison because you have to know what the hypnotic session consisted of. A person who's under hypnosis is very suggestible.

Q Right.

A And if you suggest things to them, they're more likely to confabulate, but everybody does that. Our memories are not perfect.

Q Uh-huh.

A Memory is not like a recording up there.

Q Let me ask you this—

A Everyone does that.

Q Isn't is a fact that many of the experts in the field of hypnosis, including Dr. Orne that you have recognized as an imminent expert in this field, views this phenomen of confabulation as one of the true hazards that accompany the use of hypnosis or memory enhancement through hypnosis?

A Yes, sir.

Q In fact, don't they believe that a person is much more likely to confabulate while under the influence of hypnosis than in a normal, waking state?

(p. 946) A Yes, I believe that they are.

Q All right. But you don't agree with that?

A I didn't say that. I do agree with that.

Q Okay. All right. I'm sorry. I didn't understand that. Okay. So she shoved—he shoved her up against the wall and then what happened?

A She said there was an end table in the corner that had a gun on it and she explained at that time that the reason there was a gun on the table, she and her husband was working as night watchmen, so to speak, for the business that was behind their residence. She said that she picked up the gun because she didn't want him hitting her, shoving her any more. He would not let her out the door, he slammed the door, and then I have it in quotes, "the gun went off and he fell and he died" and at that point she looked very near tears.

Q Okay. When she said he slammed the door, is that all she said? He slammed the door?

A Yes, sir.

Q And the gun went off?
And the gun went off, then he fell and he died.

Q Is that all she said?

A That's what she said at that point; yes.

(p. 947) Q Did she change that story under hypnosis?

A No.

Q Did—

A No.

Q Did you, she say anything to you about him striking her again?

A At thi s point?

Q Uh-huh, after he shoved her up against the wall?

A This is what she said to me in the interview, what I just read to you.

Q Okay. Did at any time—you also concede you didn't get every word down, so I'm trying to—I'm not trying to trap you. I'm trying to see if there were anything—

A If she had said to me "then he hit me again", I would write that down.

Q Did she say anthing to you about when he slammed the door he struck the gun or struck her?

A No. If she had said that, I would have written that down.

Q Okay. Did she say anthing about where she was standing when he slammed the door?

A No.

(p. 948) Q Did she say anything about any more blows to her or the gun in any way?

A She said right here, what I have read to you.

Q Okay.

A That's the basis of, I mean it may not be word for word. In summary, this is the meat of what she said. If she said anything like that, I would have written it.

Q So as far as what your notes show and what you can recall, after he pushed her one time there was never again any physical contact between her and him?

A She didn't mention any physical contact.

Q Okay.

A No.

Q All right. Did she talk to you about what? Her holding the gun?

A Not at this point, no.

Q Did—she did some later?

A In the hypnosis she did talk about holding the gun.

Q What did she say there?

A Which part?

Q About holding the gun?

A I had her go back to the night of the incident (p. 949) and I had her picture what was happening and she, and I asked where is the gun and she said it's in my hand, she saw the gun in her hand.

Q What else did she say under hypnosis about that?

A That's about all.

Q Did she say anything about him striking her under hypnosis?

A You would have to listen to the tapes. I'm not sure. She did mention the door slamming, the gun going off, but it's very difficult to understand what she is saying.

Q Did she—did you talk to her, do you know what type of gun it was?

A No, I don't. I did know, but I don't remember any more.

Q Who told you about what type of gun it was?

A Well, actually she told me, then I asked my husband about that kind of gun and so, but I don't remember what kind of gun it was.

Q Is it in the notes there when she tells you what type of gun it was?

A No.

Q That's once again, not—you didn't consider it relevant?

(p. 950) A She said it was a handgun.

Q Well, talking about it being a double action or single action gun?

A I don't know about that.

Q If she had told you, like, for instance, you know the difference between, some guns have to be cocked before they're fired?

A I know that now, but I didn't know it at the time.

Q She didn't tell you?

A No. My husband told me that later.

Q How did he know about it?

A Well, my husband knows more about guns than I do.

Q How did he know what type of gun was used in this incident?

A I was talking to him about it.

Q Okay. So she didn't tell you what type of gun it was and so you had no idea it was the type of gun that had to be cocked before it was fired?

A I didn't on the first session.

Q You did on the second session?

A I had talked to my husband. He told me that some guns have to be cocked and some don't. (p. 951) I thought all guns had to be cocked. The only kind of gun that I, I have only shot one gun and it had to be cocked. I didn't know some guns don't have to be cocked. I thought all guns had to be cocked.

Q In the history interview, did she say anything about how, expressing surprise about how the gun became cocked?

A No.

Q In the hypnotic interview?

A No.

Q Or the post-hypnotic interview?

A No.

Q Or discussions?

A No.

Q Did she tell you where she was pointing the gun?

A I asked her where the gun was pointing and I believe she said to the wall.

Q Was that in the history interview or the hypnotic session?

A The hypnotic session. In the second session, I asked her more direct questions. I think it was in the second session that I asked her things like where was the gun pointing, where (p. 952) did you see the gun, is the gun cocked, and some questions like that.

Q Did she tell you in the history session about what she did with the gun afterward?

A No.

Q Did she tell you during the hypnotic session what she did with the gun afterward?

A No.

Q Okay. Now, exactly what technique did you use to put her under hypnosis?

A Okay. Well, I used—first I used deep muscle relaxation and then I used arm levitation suggestion, and then some regression techniques.

Q Okay. I don't want to go through a year of hour and a half sessions to learn this, but what are arm levitations?

A Well, arm levitation serves two purposes. One, it helps you to know if the person is a good subject by seeing if you can in fact do this in a reliable way, and it also serves to show the patient that this can happen, which makes them more relaxed and more susceptible to

believing that they can be hypnotized and it's easier to hypnotize them after you do something like that.

(p. 953) Q Do you remember what detailed questions you had asked her in the first hypnotic session?

A I asked her very few in the first one. I really—I really don't remember any specific ones. It's been a long time ago.

Q Okay.

A In the second one, I then know I was asking her some questions like, you know, where's the gun, you know, and she said, would say it's in my hand, then I would say where is the gun pointing and then what did you see and I know I asked her if the gun was cocked and it was only after that that I learned that some guns don't have to be cocked.

Q Okay. After or during that session or before it, did you do any—aren't there some tests you can do sometimes to determine if they're faking hypnosis?

A No. There are tests—well, some people think, I have seen people use some things like that. There's nothing real clear in the literature about that. There are tests you can use to see if people are good subjects.

Q Uh-huh.

A And those are some things I did do, the arm, (p. 954) well, the arm levitation is one, eye roll is another one, and where you ask the subject to look up as high as they can. People who can look, keep their eyes open and look way up are easier to hypnotize than people who can't roll their eyes way up in their heads.

Q I believe you said after the first session you didn't conduct a post-hypnotic interview, you just made sure she had calmed down?

A Right.

Q And you sent her on her way?

A Right.

Q Did you call Mr. Putman and report to him?

A I don't remember if I called him or if he called me, but we did speak by phone.

Q All right. Could you tell us what that conversation consisted of?

A Basically it consisted of me saying that I don't think that she knows any more now than she did before the session, knowing nothing at all came of it, and that's that.

Q Okay.

A But that she was a good subject and that I thought she was hypnotized, it was difficult to understand her but that I didn't hear (p. 955) anything new in the session from what she had told me before, that I was willing, I said sometimes if you hypnotize somebody a second time they're more relaxed. I will hypnotize her one more time if you want me to, and he said fine.

Q All right. What was the purpose of the second, you-all actually decided there would be another hypnotic session?

A Yes.

Q What was the purpose of it?

A The same thing.

Q To try and get more details?

A Yes.

Q So I believe you said you brought her back, and how long did you talk to her before you hypnotized her the second time?

A Well, we talked for a little while.

Q Did you talk about the reasons you were going through it again?

A I don't remember. I don't remember if I specifically told her why we were doing it again. I know that when she left the first time she did not know she was going to be coming back the second time.

(p. 956) Q All right.

A The second time that she came back, I was late for the session because of something that came up at the hospital and her mother was irritated with me about it and so Ms. Rock, Vickie and I discussed that for a little while and she discussed with me some of the pressures that her family had been under and her father's death and some pressures her mother had been under, so we just talked for a little while about that.

Q Did you take notes on that?

A No.

Q Any reason why?

A Well, I just didn't, it didn't have anything to do with what we were, the incident at all. She was talking about her mother being angry in the waiting room.

Q Didn't—

A Then we started the session.

Q Well, are you telling us that she had no idea why she was coming back for another session?

A I'm sure she did. I'm sure Mr. Putman told her why she was coming back.

Q Well, in your own mind, based upon your (p. 957) conversation with her that you didn't make any notes of, are you convinced that she knew she was coming back so you-all could make another attempt at getting more detailed information out of her?

A Yes.

Q So once again she was, but you, you made no notes that conversation?

A Right.

Q Would you agree with Orne and some of the other experts that a lot of times, that the motivation of a patient is important to know, may sometimes, may be an important part in how they respond during the hypnosis session?

A Sure.

Q Such things, as self-preservation?

A (Witness nods to the affirmative.)

Q Such things as trying to help themselves in a criminal case?

A Yes.

Q And so the fact that she knew then that she was there to try to get more detailed information out would be an important factor for us all to be aware of; isn't that correct?

A Correct.

(p. 958) Q All right. And I believe you said then you hypnotized her and this time you did ask her for detailed questions?

A I asked more detailed question this time.

Q All right. Now, isn't that in violation of everything you have been telling us about, that you don't ask detailed questions because people can confabulate?

A No. If you read the literature, it's usually acceptable after the first session and the second session or maybe subsequent sessions to ask more direct questions.

Q No danger of them confabulating?

A You have to be very careful how you word things and what you said. There is a danger. You can't, you don't want to suggest things, you know, if you say—

Q We understand that, but you ask more detailed questions, but now you're saying that the experts say, are we talking about Dr. Orne, too, that he says that there's no danger of this, danger of confabulation, that it blows up, dimi-ishes, as the more, the more hypnotic sessions?

A I didn't say that.

(p. 959) Q I thought you did.

A I'm sorry. You misunderstood me.

Q What are you saying about it?

A I have said that in the first session it's better to let the person just spontaneously tell you what they remember, that you're likely to get more accurate information than if you ask real direct questions.

Q All right.

A Okay. Later on, you might, it says in the many articles you might want to ask more direct questions to get more detailed, more information.

Q Do you remember before lunch when I asked you why you had the second hypnotic session?

A Yes.

Q Do you remember what your answer was?

A I said I really didn't know why.

Q Can you tell us why that your answer has changed since lunch?

A My answer has not changed.

Q Didn't you just say a while ago you and Mr. Putman decided, based upon your analysis she was a good subject for hypnosis, and if he wanted you to you would give it another shot, (p. 960) and get more detailed information?

A Well, yes, and that's true. I'm just saying I didn't have any specific reason for doing it. I just decided, well, we'll try again, but I was trying to say, is I didn't feel real strongly about it one way or the other.

Q Okay. After the second session, well, and you asked these more detailed questions, did you get more information?

A No.

Q In response to your detailed questions, did you get any more detailed answers?

A No.

Q Did she say anything different in the second hypnotic session than she had told you, oh, back in the pre-history or the pre-hypnotic history interview?

A There are only two things that I can recall that were different in the second session. She did mention he wants the gun, he wants the gun. She mentioned that a couple of times.

Q Did you ask her about what she meant about that?

A No. You don't ask questions like that in hypnosis.

Q Oh, you don't?

(p. 961) A You don't ask what do you mean by something. You know the person is in a process and you just kind of let them go with that. The only other thing that was different in the second session was she said something about going to the bar for help and those are the only two things that—

The Court: I'm sorry, I didn't catch that.

Dr. Back: Going to the bar for help.

The Court: Uh-huh.

By Dr. Back:

A Those are the only two things that were new information or anything that I hadn't heard before.

Q Let's see, after that hypnotic session, and I suppose you tape recorded it?

A Yes.

Q Did you see any need to hypnotize her further?

A No, I really didn't. I felt that nothing had really been accomplished.

Q Okay. Have you, you have had occasion to (p. 962) view a videotape of another hypnotized—placing somebody into a hypnotic trance and going through a hypnotic session with them?

A A videotape?

Q Uh-huh.

A I can't recall one specifically. I may have seen one in the internship. We saw lots of videotape of all kinds of patients in different sessions.

Q Do you remember we were talking a while ago about the fact that sometimes that a hypnotist can be fooled by a patient?

A Yes.

Q And I believe that you—would agree with the statement that sometimes there are alleged giveaways that the patient is faking or not as deeply under the trance as they might otherwise be appearing to be, that the hypnotist might miss?

A Well, yes.

Q Would it seem to, let's say, for instance, if you were asked to evaluate another hypnotic session?

A Uh-huh.

Q Between another hypnotist and somebody he had (p. 963) hypnotized, if he came to you and said I'd like you to evaluate this session to, for the purpose of seeing if I missed something, if you think this person was faking or lying or confabulating or whatever, do you think it would be an advantage if you were to have a videotape to view?

A It might be; yes.

Q As opposed to just a tape recording?

A Uh-huh.

Q Because when—you agree that there are things like the body movement sometimes are giveaways?

A Well, yes.

Q Things like respiration rate is watched and the way the arm levitation is done, that kind of thing?

A Yes.

Q Would you say some twitching or movements by the patient may be sometimes giveaways that maybe they're not as deeply under as they act?

A Well, I'm not sure what you're—

Q Reaching up and scratching their face when they're supposed to be in the sixth level of subconscious or whatever?

A Right. Well, I think those would be giveaways (p. 964) that most people would notice.

Q I'm saying, though, that aren't those things some things that might possibly help you evaluate that session?

A You mean if I wanted a second opinion?

Q Uh-huh.

A And if I wanted a second opinion, someone would certainly have to observe it.

Q Okay. But did I hear you say that you're not aware of any of the experts in the field that advocate videotaping these sessions particularly in criminal matters?

A No, I didn't say that.

Q Are you aware of some?

A Yes.

Q Who?

A I said to you earlier I was aware that many of them say that audio or video but that video is certainly good if you can do it.

Q Isn't it preferred?

A I don't know that I have read that it's preferred. I'm not saying that it doesn't say that in research. I know that I have read, they say either/or.

Q And I believe that you said earlier, agreed (p. 965) with the idea that there are in this, in the contact that the hypnotist has with a patient prior to the actual hypnotic session, that there, it's ripe with danger, I guess you would say, of the hypnotist doing something even unconsciously that might be suggestive and might play a part in how the patient responded under hypnosis?

A Right. If the hypnotist has some information about the answers, say, or who they think committed a

crime, well, then there is a danger they might in some way subconsciously lead the patient in that way. That's why it's best if the hypnotist doesn't know any information about that, the facts, or what could have happened or that I know of this—

Q Isn't there a real danger in the hypnotic session or looking at it from start to finish, that if you gained the trust of a patient and they like you or they trust you and they understand that you're out to help them, not hurt them, that isn't there a danger sometimes that they, this builds within them a desire to please you and come up with answers to (p. 966) things you're looking for?

A Yes, that's true.

Q And isn't it possible, say, that like if during this history that you were taking and you are discussing that, you discussed some of the things, some of the reasons you were having these hypnotic sessions, isn't it possible that at that time the patient began to want to make sure that you got answers for going to all the trouble of putting her under hypnosis? Isn't that possible?

A It's certainly a possibility.

Q That would be one more reason for, let's say, recording the history-taking session, just to judge and see if you did, say, mess up and were too suggestive?

A I'm sure that videotape would be helpful in all instances.

Q Or even a recording of your interview with her?

A Uh-huh.

Q I believe that—one minute, please—and I believe you said you have the tapes of your two hypnotic sessions?

A Yes.

(p. 967) Q Do you have anything to play them on? No.

Q What kind of tapes are they?

A It's just a cassette tape, small cassette.

Q Are they both on the same tape?

A Yes, uh-huh.

Q Would you want to take them out and, I don't think or I don't know if they have anything to play them or not.

A (Witness complies.)

Mr. Clinger: Your Honor, I'm going to ask that the tapes be played.

The Court: Okay.

Mr. Putman: Your Honor, may I suggest that we do this after the end of cross examination and redirect, if any, of this witness has been concluded? She has patients that are waiting on her and I know she's been subpoenaed by the (p. 968) prosecution, but at the same time I would like to extend as much courtesy as possible to people that need her professional help.

The Court: Well, I don't understand it, but I don't see how the cross can be completed till the tape is played.

Mr. Putman: I gather since there are two sessions anywhere from an hour to two hours worth of tape recording there.

The Court: Well, I'm not sure I can do anything about that.

Mr. Putman: Your Honor, in addition to that, I'd like to move that anything done with the tapes, that it be impounded by the Court and, further, that all of it be listened (p. 969) to by the Court before the Prosecuting Attorney and when they do it it will be under circumstances which the tape is always under the control of the Court and that defense counsel be given an opportunity to be present at all times.

Mr. Clinger: Your Honor, I have no objection to the tape being admitted into evidence and be in the custody of the Court Reporter, that doesn't have anything to do with it being played right now. I agree with the Court. I can't complete my cross examination until we see how she conducted the interview.

The Court: Well, let's proceed with (p. 970) (REPORTER'S NOTE: After a brief recess, court reconvened with the following proceedings.)

The Court: All right. Let's play the tape. I need to know which is which, unless they're internally designated.

Mr. Clinger: Your Honor, at this time I will offer, I will ask that the witness, to take the covering there off the tape.

Dr. Back: I though you already had.

By Mr. Clinger:

Q All right.

A Start on this side.

Q I believe you were saying that the first interview is on Side A?

(p. 971) A Uh-huh,A, and I believe that the tape ran out during the first interview and I flipped it over, so part of the first interview then is also on Side B. You just need to flip it over at that point.

* * *

(p. 1006) (REPORTER'S NOTE: Side Two of State's Exhibit 2 played to the Court. After the tape was completed:)

The Court: All right. Go ahead, Mr. Clinger.

CONTINUING CROSS EXAMINATION

By Mr. Clinger:

Q Dr. Back, to be quite honest with you, I was shocked at the ending of that last tape. Wasn't (p. 1007) that in fact a post-hypnotic suggestion to the Defendant that when she came out of the trance and went back over to her attorney that she would have a vivid memory of all these things she stated to you under hypnosis?

A That's exactly right.

Q Isn't that post-hypnotic suggestion? Doesn't that fly directly into the face of everything that Dr. Orne talked about, about this being an abuse of hypnosis, implanting the things they can barely remember so they'll be crystal clear so that when they take the stand later it will come out as if it's been strong in their mind from start to finish?

A During hypnosis you always suggest that the person will be able to remember or will be able to see things

that was clear all the way through. You always suggest they will be able to.

Q Remember earlier when we read excerpts from Dr. Orne's treatise in which he stated that it was a violation, that it's wrong, that it sets up a phony witness?

A I'm not sure what you're asking.

Q Can you explain to the Court why it was (p. 1008) necessary for you at the end of that to tell her that when she woke up she—from that point on would remember everything vividly and clear, awake, and when she looked at the, at Mr. Putman's eyes she would remember all these things as if she had remembered them all along, remembered them strongly? Why was that necessary if you're not being an advocate in this case?

A It's always necessary to, you are going to get a person to remember something, to give them the suggestion that they will remember it.

Q Why didn't you do it as the close of the first tape if you always do it?

A I gave her suggestions all along that she would be able to remember and remember like—

Q I didn't hear them in the first tape. Did you close, have a grand finale on the first tape saying these same things you did on this one?

A No, I didn't.

Q You know you were saying on direct examination or cross examination you don't ask detailed (p. 1009) questions?

A I did.

Q Are you saying you didn't ask detailed questions in the first hypnotic session?

A I did ask some, but you said, in the earlier part. I try to let her pretty much let her say what she remembered. What I repeated were the things that she was saying.

Q Remember on the tape just now when I could hardly hear her asking this specific question: before he grabbed his chest, what do you see? Is that not asking or trying to elicit a specific detail?

A Yes. I'm trying to get her to see the events as they happen.

Q Is that direct? Isn't that a detailed question that you said you avoided in the first one?

A She said he grabbed his chest and I said before he grabbed his chest what did you see. I tried to move her backward.

Q You asked her look for the gun, where is the gun?

A Right.

Q Isn't that trying to elicit a detailed, a specific detail?

(p. 1010) A Yes. I told you in the second session I asked more specific questions.

Q I'm talking about the first session. I got these notes right out of the first session.

A Well, I may have asked that in the first session.

Q Do you remember the—do you see anything else—

Mr. Putman: Your Honor, he's not letting her answer the questions.

The Court: Yeah, you're cutting her off.

Mr. Clinger: I apologize to the Court, Your Honor.

By Dr. Back:

A Pardon me?

Q You asked this: Did you see anything else. Did you ask that the first session?

A I may have.

Q Do you remember?

A I--

(p. 1011) Mr. Putman: Your Honor.

Mr. Clinger: I think that's a legitimate question.

Mr. Putman: Your Honor, I'd ask that you instruct him to allow the witness to answer.

The Court: Just slow down a little and let her answer.

By Mr. Clinger:

Q Do you remember asking the specific question "Where is it pointing" in the first session?

A I don't remember specifically, but I probably could have asked that. I don't see there's anything wrong with that.

Q Is that not an attempt to elicit very specific details of major importance?

A Yes. I'm trying to get her to remember and to see the events.

Q Doesn't that fly in the face of the testimony earlier you don't ask specific questions because they're going to confabulate?

A I said you don't ask leading questions.

Q Leading now?

A Yes.

(p 1012) Q Is it, has it changed now from the question of asking leading questions as opposed to the questions asking for specific details? Wasn't that what we were talking about a while ago?

A You sometimes have to ask detailed questions, but you try not to ask questions that would lead the witness in any way to bring up information that they may not have mentioned to you.

Q All right. Now, of course, in the second session you said what happened, amongst other things, what happened when, while he fell to the floor? Did you ask that?

A I don't think I asked what happened while he fell. I think she said that he fell to the floor and I said what happened before he fell to the floor.

Q All right. Another one, specifically, what did you see right before he fell to the floor?

A Yes.

Q Can you see the gun?

A Yes.

Q Is the hammer cocked?

A Yes.

Q Look at the gun. Is the hammer cocked?

A (p. 1013) Yes. She had mentioned when I said do you see the gun, she said her thumb was on the hammer. That's on the tape.

Q Can you remember when you cocked the hammer?

A Yes. I asked did she cock the hammer.

Q Can you remember cocking the hammer?

A Yes.

Q That's five questions. Suddenly you're asking of the gun. Now, a while ago did you not, in response to some cross examination, tell me that the only reason you got in the cocking business was because you talked to your husband after the first session?

A No. I didn't know until after the second session that you didn't have to cock a gun. I thought you cocked all guns.

Q Oh. When did it come to your mind to ask all the questions aout the hammer and the cocking of the hammer?

A When she said she saw her thumb on the hammer.

Q It wasn't because of the conversation you had with the defense attorney following the first session?

A No.

Q Was it all on your own?

(p. 1014) A Yes.

Q Asking the same questions five times trying to elicit that? Is that not in violation, violating the charm, the spell, the power you have over a person under hypnosis?

A I don't believe it is.

Q Forcing them to give you answers—

Mr. Putman: Your Honor, let her answer the question.

By Dr. Back:

A I was trying to get—

Mr. Putman: I'd like to hear her answer.

By Dr. Back:

A I was trying to get her to remember what happened, to see the event, when she said she saw her hand, that she was handling the gun and she saw her thumb on the hammer. I was trying to get her to slowly go through what happened.

* * *

CONTINUED EXCERPTS FROM THE TESTIMONY OF VICKIE L. ROCK CONTINUING DIRECT EXAMINATION

(p. 1025) By Mr. Maglothin:

Q Now then, Vickie, I am looking at Dr. Betty Back's notes and I'm going to go through the notes and ask you certain things about that and the Court has given us reasonable latitude on your testifying as to what happened

on July the 2nd, 1983. It says in her notes "the patient states she and her husband were discussing moving out to a trailer she had previously owned. He was set on moving out to the trailer, she thought they should discuss". Explain to the Jury what you-all were talking aout?

A It was a trailer that we moved—

Mr. Clinger: I think I need to object. Isn't that hearsay?

The Court: Overruled.

Mr. Clinger: I think I was—

The Court: Overruled. Proceed.

By Ms. Rock:

A It was the trailer that I had owned before Frank and I got married and then, out in Avoca, (p. 1026) that was a little ways down from his parents' house and we had been talking about moving out there and he was set on moving out there right away and everything but I felt like that we had to discuss it because there were some, so many things that had to be done to it before we could actually move in.

Q All right. Now, the next statement that she has, she's referirng to you being upset and went to another room to lie down. Now, explain to the Jury where you went?

A I went to the beauty shop which was connected to the apartment and went in there and I layed down.

Q All right. Then it says next "brother came and left". Now, which brother are we referring to?

A Jeff.

Q Jeff? And explain to the Jury briefly what happened?

A Jeff came back for pizza and I went in the room, I was in the beauty shop and then Jeff left.

Q Okay. Were you in it, still in the other room in the beauty shop at the time that (p. 1027) Jeff left?

A Yes, I was.

Q Okay. Did Frank ever come into the beauty shop and say anything to you?

A No.

Mr. Clinger: Object to that as going far beyond those notes.

The Court: Overruled. Go ahead.

By Mr. Maglothin:

Q In the next statement that Betty Back had, Dr. Betty Back says in her notes "she came out to eat some of the pizza, I'm sure it's of the pizza, he wouldn't allow her to have any, she said she would go out and get something to eat, he wouldn't allow her". Okay. Now, explain that to the Jury, about that?

A I come back into the room and I asked Frank if I could have some pizza and I was refused the pizza and I decided that I would go and get something to eat and when I began to leave that's when everything happened.

Q All right. And the next statement that you have (p. 1028) in here or that you told Dr. Betty Back, "he

pushed her against a wall and end table in the corner with the gun on it". Now, there's been a number of photographs introduced by the State and State's Exhibit No. 12, is this the end table that you were referring to that you told Dr. Betty Back about?

A Yes.

Q Okay. Show the Jury, and you will have to hold it up so the Jurors on the end can see it. Now, show the Jury where the gun was kept?

A The gun always laid right here, right in here.

Q Okay. When you say always, was the gun ever kept underneath the bar?

A No.

Q All right. And the ammunition for the gun, where had you kept the ammunition for the gun?

A Frank set it by the phone.

Q All right. Now, there's also, in State's Exhibit No. 12, three shotgun shells and there has previously been introduced into evidence State's Exhibit No. 6 and let me have that one there and you hold this one up, (p. 1029) and is that the same end table that's referred to in State's Exhibit No. 12?

A Yes.

Q Okay. Is that where the shotgun was kept?

A Yes.

Q Okay. Was the shotgun loaded?

A Yes.

Q All right. Vickie, had you ever had any experience in shooting that shotgun?

A No, I never shot it.

Q Okay. Who's shotgun was it?

A Frank's.

Q Where did he get it?

A He bought it from a man in Virginia that, he wanted a gun and he knew a man—

Mr. Clinger: Objection to this. Isn't it hearsay. Your Honor?

The Court: Well, I don't think we need to go into the hearsay details.

By Mr. Maglothin:

Q You can't say what someone told you. Just where did he get the shotgun?

A He bought it from another Navy man.

(p. 1030) Q Okay. Do you know whether this shotgun is automatic or pump?

A Well, I know that you have to pull the thing back on it.

Q What thing is that?

A There's a grip or something that you have to pull back on it and then pull forward again.

Q Okay. Now, who showed you that?

A Frank.

Q This .22 that's been introduced into evidence that you bought for Frank on your anniversary, have you ever shot that .22 before in your life?

A No, sir.

Q Do you know the difference between a single action revolver and a double action revolver?

A No, sir, I didn't know anything about the gun when I purchased it. I took it back when I purchased it and showed it to my daddy.

Q Now then, Vickie, the next statement in Dr. Back's report, "well, he pushed her against a wall and end table in the corner with a gun on it". Again, I'm going to have to refer to the pictures and let's look at State's (p. 1031) Exhibit No. 6. All right. Can you show the Jury which wall you're talking about, which wall you were pushed against?

Mr. Clinger: Your Honor, I have got to object to this. This is an elaboration. It's far beyond either the notes or the testimony that was later given. As a matter of fact, I specifically asked Dr. Back if she described which wall or hall and she said no to both and now this is expanding the statement far beyond what the notes were.

The Court: Sustained.

By Mr. Maglothin:

Q Did in fact your husband push you against the wall?

A Yes.

Q The next statement is "she picked the gun up, stated she didn't want him hitting her any more".

(p. 1032) Did you in fact make that statement to Frank Rock?

A Yes, I did, don't hit me any more.

Q Okay. Vickie, why did you pick the gun up?

A To scare him so I could get out of the house.

Q Okay. Had you ever seen him act the way he was acting before?

A No, no, he never never acted like that. He never tried to hit me or anything.

Q What were you trying to do?

A I was trying to get out of the house. I just wanted to leave.

Q The next statement in Dr. Back's notes, "he wouldn't let her out door, slammed door and 'gun went off' and he fell and died". Did you in fact tell Dr. Betty Back that?

A Yes.

Q And explain to the Jury how—well, let me ask you through the pictures. The State has previously introduced a photograph of the doctor's—State's Exhibit No. 11. Is this the door that you were referring to?

A Yes.

(p. 1033) Mr. Clinger: I object. I have got to refer the Court's attention to several specific questions I asked Dr. Back. We were giving her the opportunity to elaborate, telling us everything that was said to her. I remember—

The Court: Let me see it. Which one?

Mr. Clinger: Starting right here, through the next page.

The Court: Mr. Maglothin, approach the Bench, please.

(Reporter's Note: Attorneys at the Bench.)

Mr. Maglothin: I was just going to ask her if this was the door that slammed and what happened at the door.

The Court: All right. Overruled as to that.

By Mr. Maglothin:

Q On State's Exhibit No. 11, is this the (p. 1034) door that you were referring to that slammed when the gun went off?

A Yes.

Q Okay. Now, where were you standing at the time the door slammed?

Mr. Clinger: Object to that. I just showed you statements where she specifically stated to the, Dr. Back, she did not say where she was standing. I'll show you again.

The Court: Yes, I read it. Well, it's not covered in the interview specifically.

Mr. Clinger: If it please the Court, Your Honor, I specifically asked Dr. Betty Back—

The Court: Yes, I understand. I think I will have to sustain that objection.

Mr. Maglothin: Let the record reflect that the witness, if she had been allowed to answer, that (p. 1035) she would have testified that we were standing immediately in front of the door of State's Exhibit No. 11, that she reached

with her hand and tried to get out the door and that Frank Rock grabbed one hand, jumped in front of her, grabbed the firearm, and it went off.

(Reporter's Note: The above proffer was out of the hearing of the Jury.)

By Mr. Maglothin:

Q Vickie, the next statement, "he wouldn't let her out the door", did you tell Dr. Back that?

A Yes, I did.

Q Would your husband, Frank Rock, let you out of the door when you were leaving?

A No.

Q "Slammed door and gun went off and he fell and he died". Now, Vickie, without violating the Court's order, can you tell me how that gun (p. 1036) went off?

A No.

Q Do you know how the gun went off?

A Yeah, I—yes, I do.

Q Now, Vickie, there's—you were in the courtroom when Officer Mike Jones testified?

A Yes, sir.

Q And I have previously, have marked this as Defendant's Exhibit No. 7 for identification. Did you, what, is this a copy of that document?

A Yes.

Q Is that the, your signature on the bottom of the document?

A Yes, it is.

Q Okay. Did the police have you sign that?

A Yes, sir.

Mr. Maglothin: Your Honor, I move to introduce Exhibit 7.

Mr. Clinger: Objection. It's hearsay, irrelevant and everything else, Your Honor.

The Court: Let me see it. Well, this is not admissible.

Mr. Maglothin: Your Honor, it's a, the only (p. 1037) statement she signed.

Mr. Clinger: It's the probable cause statement to the Defendant at her arraignment and that's what they know.

Mr. Maglothin: It's a sworn statement made by one of your officers that she signed when she was in the jail.

The Court: It's not admissible.

Mr. Maglothin: This is Defendant's Proffered Exhibit No. 7.

By Mr. Maglothin:

Q Now then, Vickie, did you tell the officer at the police station that the death of your husband was an accident?

A Yes, sir.

Mr. Clinger: Leading, Your Honor.

The Court: Overruled.

By Mr. Maglothin:

Q Did you tell more than one of the officers?

A Yes.

(p. 1038) DEFENDANT'S EXHIBIT NO. 7
IN THE MUNICIPAL COURT OF
BENTONVILLE, ARKANSAS

STATE OF ARKANSAS

PLAINTIFF

VS.

VICKIE ROCK

DEFENDANT

AFFIDAVIT OF PROBABLE CAUSE

Comes now Mike Jones, Criminal Investigator, Rogers Police Department, and under oath doth state:

On July 2, 1983, at approximately 10.08 p.m., the Rogers Police Department was contacted by a telephone operator who stated that a female subject had called requesting police and ambulance at 801 N. 2nd, claiming that someone had been shot. Officers, Steve Helms and Jim Fawcett, were the first at 801 N. 2nd and found a white male lying on the floor with what appeared to be one (1) shot to the left chest area. At that time, Officer Helms was unable to locate any pulse on the man. Also present was a white female approximately 35 years of age. Officer Fawcett stated that he asked the female where the gun was and after several seconds she indicated it was behind the bar approximately 10 ft from the man on the floor. The female further stated that she had shot the man after a fight. Officers Helm and Fawcett stated the room did not show any signs of a struggle taking place and that the woman did not have any marks or bruises on her body.

I then arrived at the Rogers Police Department where I advised the female, who had been identified as Vickie Rock, 34 years of age, of her rights. Ms. Rock signed a rights form indicating she understood her rights. I asked her what had happened and Ms. Rock stated that her husband had been beating her, she had the gun in her hand and that the gun had gone off. Ms. Rock further states that she had been choked and struck. At that time, I noticed no visible marks or bruises on Ms. Rock's face, neck or arms.

I then went to 801 North 2nd and viewed the scene of the shooting. The apartment showed no signs of a struggle taking place and the pistol, a .22 caliber revolver, was found approximately 10 ft. from the body who had been identified as Frank Rock, 23 years of age.

The man, Frank Rock, was transported to Rogers Memorial Hospital where he was subsequently pronounced dead by the attending physician.

/s/ Mike Jones
Mike Jones, Criminal Investigator
Rogers Police Department

(p. 1040) Q Vickie, I want you to describe to the Jury how you felt when your husband fell in that living room?

A I felt like I had to get him help. I knew that if I didn't get him help he would die.

Q Vickie, did you intentionally shoot Frank Rock?

A No, I don't . . . I wouldn't hurt him for anything.

Q Did you ever point the gun at Frank Rock?

A No.

* * *

RECROSS EXAMINATION

(p 1140) Q Now, do you remember when you talked to Dr. Betty Back?

A I don't remember the date; no, sir.

Q Okay. Now, am I correct on this, that in all those statements in which you talked to the police, we have been reading them to you?

A Yes.

Q And they got up here and testified, would you agree that none of them have ever said you said anything about wanting some pizza?

A As far as I know they have not. I don't know, I don't remember any of it.

Q. All right. These were interviews they had with you, right, after Frank was killed; isn't that correct?

A Yes.

Q All right. Now, do you remember being interviewed by Dr. Betty Back September the 12th, 1984?

A I remember talking to her, but I don't remember the date.

Q Okay. Is that about the right, will you agree that's about the right time?

A I guess.

(p. 1141) Q Approximately a year? You have absolutely no idea whether it was the same year even that Frank was killed?

A I have no idea what the date was.

Q Do you recognize these as copies of her notes she took?

A Yes.

Q Do you see the date up here, 9/27/84?

A Yes.

Q All right. Do you have any argument that's when you talked to her?

A No, sir, I'm not, I'm just saying I don't remember the date.

Q All right. Would this be approximately fifteen months after Frank was killed?

A Yes.

Q Now, did you understand that you were there to be hypnotized, that you could have your memory refreshed of some details about this thing you couldn't remember?

Mr. Maglothin: Object, Your Honor, and ask to approach the Bench.

REPORTER'S NOTE: The attorneys out of the hearing of (p. 1142) the Jury at the Bench.)

Mr. Maglothin: Judge, I thought the order stated she couldn't testify except for those, what was in Betty Back's notes. If we're going up on everything on Betty Back, I'm going to have to call her as a witness and, well, we'll have another half day hearing on qualifications and hypnosis.

The Court: Well, I don't see what the necessity is. What are you getting at?

Mr. Clinger: I'm going down to make sure I can show the Jury what she told Ms. Betty Back when she was under the request to give all the details. She's just got through testifying on direct examination she knew certain things although she wasn't allowed to testify, in fact, the last time she knew exactly. (p. 1143) Now, again, I think I ought to be able to show that this was only inconsistent with her recollection before she was hypnotized.

The Court: Well, I'm not going to permit you to go into the hypnosis or anything about it or anything like that but the first interview by Dr. Back, you can go into that.

(REPORTER'S NOTE: Back within the hearing of the Jury.)

By Mr. Clinger:

Q Now, was it your understanding that you were there, that you talked to Dr. Betty Back for the purpose of later undergoing some hypnosis to, so you would be able to remember certain details you couldn't remember in your normal state; is that right?

A No, sir. Mr. Putman had said that I was going there to be hypnotized so he would know what happened.

Q Okay. You understand you were there to be hypnotized; is that right?

A Yes.

(p. 1144) Q Now, there's been some statements made —did you understand what specific things you were sup-

posed to, he was worried about, whether, about you knowing or not knowing?

A I knew there was things I couldn't remember.

Q Okay. Now, you talked to Dr. Back; is that correct?

A Right.

Q. And you described the incident that occurred there in your apartment that night that wound up with Frank lying in the front door with a bullet in his heart? You described the events; is that right?

A No, sir. She told me not to go into details.

Q Told you not to go into details?

A Yes.

Q Well, did you go into details?

A I told her that--

Q Did you go into details?

A I told her some things about it; yes.

Q Wait. You have heard testimony here in court; right? We had a little hearing over this hypnosis stuff; right? And you were sitting right over there at counsel table?

A Yes.

Q Don't you remember her telling the Judge and the (p. 1145) attorneys that she didn't ask you detailed questions because she didn't want to put words in your mouth; do you remember hearing that?

A Yes sir.

Q Did she—she didn't say anything about not asking you for details?

A She asked me to tell her what had happened, but she also told me that she didn't want me to go into too much detail.

Q Can you show me where that shows up anywhere, anywhere at all? I've got a big old transcript here. Can you show up anyplace she ever told me don't give me any details?

A No, sir. I said she said she didn't want me to go into too much detail.

Q Did you try to describe to her what had happened that evening?

A I told her that Frank had died and I told her—

Q Let me ask you this: did you try to tell her what had happened that evening?

A I believe I did.

Q You believe you did? That's easy to answer; isn't it?

A (No audible response.)

Q Did you tell Dr. Back that you got along with your (p. 1146) husband fairly well?

A Yes.

Q Did you tell her he had never hit you?

A Yes.

Q Did you tell her that the night of the incident it was the first time he had ever got rough with you?

Mr. Maglothin: Excuse me, Mr. Clinger. Let me get my transcript.

By Mr. Clinger:

Q Did you?

A I didn't.

Q Did you tell her this, some fifteen months later after he was dead, that your husband had been drinking that night and there were, marital problems revolved around his drinking problem?

A No, sir, I don't remember telling her that, I don't remember telling her that our marital problems were around.

Q Would it help to look at the transcript of her testimony? Would that maybe refresh your memory? Let me ask you, whether you told her that or not, did you tell her, like you're in here telling this (p. 1147) Jury, that, what exactly did you say?

A I don't remember what she said or did say in her testimony.

Q Well, let me see if I can refresh your memory a little bit. Do you remember the following specific questions that I put to Dr. Betty Back when she was on the stand and were were sitting right over there? Okay. This is Page 37, okay. "Okay. So she told you how the gun went off?", and she says "No", and I said "She had no idea?", and she says "No". Do you remember that give and take between me and Dr. Betty Back?

A I don't remember it specifically, but I do remember that you asked about it.

Q Okay. Well, let's show you here, here on Page 37 of a transcript typed by The Honorable Mr. Dover of that little proceeding, how about looking up here. Can you read that? "Okay. So she told you how the gun went off? No. She had no idea? No"—

Mr. Maglothin: I'm going to have to object to it simply because Dr. Back hasn't testified and I guess he's trying to impeach Dr. Back (p. 1148) who hasn't testified in the trial.

The Court: Well, I don't think he's trying to impeach Dr. Back if he asked if she testified in the presence of this lady certain things and she said she didn't remember, so then he's using the transcript of her testimony to try to refresh her memory. I think he can do that.

Mr. Maglothin: Well, all right, Your Honor. I submit let's introduce the whole testimony.

Mr. Clinger: He knows better than that. It's got all kinds of objectionable material. I have no objection to him using it as long as he stays away from the objectionable material.

By Mr. Clinger:

Q Do you remember that give and take between me and Dr. Betty Back?

(p. 1149) A It's there; yes, sir.

Q Well?

A Like I said, I don't remember it specifically, no, sir, but it's there and yes, it did happen.

Q If that happened and if that's accurate, if this is accurate, what she's saying, "Okay. So she told you how the gun went off? No, she had no idea, no." That's a major difference in your testimony today when right at the end you told Mr. Maglothin over there I know how the gun went off? Isn't that correct? Isn't that the, a major difference between this and your last statement on direct examination to Mr. Maglothin?

A I did not know at that time.

Q Can you—okay. You didn't know at this time?

A Yes, sir.

Q When you were interviewed by Dr. Back, you didn't know?

A No, sir.

Q Now you say you know?

A Yes, sir.

Q Is that correct?

A Yes.

Q Page 40, do you remember Dr. Betty Back also talking about your conversation with her? Who arranged (p. 1150) that conference? Mr. Putman that used to be your attorney; right?

A Yes.

Q Now deceased? He was in partners with Mr. Maglothin?

A Yes, sir.

Q And Ms. White?

A Yes.

Q They arranged it; that's correct?

A Mr. Putman asked me to go down there.

Q Okay. You have no knowledge about the Prosecutor arranging that; do you?

A No, sir.

Q Okay. Do you remember Dr. Betty Back saying that you stated that you and your husband were arguing or upset about moving to a trailer? Do you remember her saying that?

A Yes.

Q. Arguing or upset? Those were her answers that, she attributed them to you; is that correct?

A Yes.

Q All right. And she said, she went further on to say "she", meaning you, felt they needed to discuss this and he seemed to be set on moving to the trailer?

A Yes, sir.

(p. 1151) Q Fair enough statement?

A Yes.

Q "This was something they were upset about this evening and they were quarrelling or arguing", her words; is that correct? Is that a correct quote I'm reading to you?

A That's what she said.

Q And those were the words she attributed to you; is that correct? When you were talking to her back, September the 27th, 1984?

A Yes.

Q Page 42. Do you remember her saying this: "You mentioned something about moving out to a trailer to her and that her husband was set on moving to the trailer and she felt they should discuss it more. She", meaning you, "was upset about this and went to another room to lay down". Is that fairly accurate? Do you remember her saying that?

A I remember her saying that.

Q Is that what you in fact told her?

A I don't remember telling her those exact words; no, sir.

Q You think she was like these other, these police officers, fabricating all of this stuff?

A I have never said anybody fabricated anything.

(p. 1152) Q Okay. Now, I believe that you remember her saying "after the brother left, she", being you, "came out to eat pizza but the husband wouldn't—would not allow her to have any"; is that right?

A Yes, sir.

Q Now, would you agree with me that if that's what you told her in that interview on September the 27th, that's the first time we got anybody saying you said something about some pizza; isn't that correct?

A I guess so.

Q Okay. Then you say "the Defendant", being you, "told her, her husband she was going out and get pizza but he would not allow her to leave the house"; is that right?

A I don't remember telling her that I was going out to get pizza.

Q You don't remember that? Would it help you to look at Page 43, help you refresh your memory a little bit? Right here, "after the brother left she came out because she wanted to eat some of the pizza and her husband wouldn't allow her to have any pizza. She said then she would go out and get pizza and he wouldn't allow her to leave the house"?

(p. 1153) A Well, I still don't remember telling her that.

Q You're not denying that's what Betty Back said; are you?

A No, sir. I'm just saying I don't remember telling her I was going out to get pizza.

Q All right. But you're not denying that's what Betty Back says you told her?

A No, sir, I wouldn't deny that's what she said.

Q Okay. It goes on, "he, he wouldn't allow her to leave the house"? You told her that, didn't you, that he wouldn't allow you to leave the house?

A I told her he wouldn't let me leave.

Q Okay. Now, let's get down to a couple of details. Did you tell her "the husband pushed her against the

wall, but she did not describe how he pushed her and she did not act it out"? Is that an accurate reflection of what she said?

A Yes, sir.

Q Huh?

A Yes, sir.

Q Also, "did not say what portion of her body he pushed"? Is that accurate?

A Yes.

Q "Defendant said she picked up the gun because she didn't want him hitting her, shoving her any more"? (p. 1154) accurate?

A That's what I told her.

Q "Husband would not let her out the door, he slammed the door and the gun went off and he fell and he died"? Is that accurate?

A Yes, sir.

Q You testified to, oh, a few details, haven't you? If your testimony is accurate, you gave here a few details; is that right?

A Yes.

Q Okay. Do you remember me asking her if you had ever told her that after that first push he ever touched you again? Remember me asking her that?

A Not specifically, but I remember.

Q Do you remember her answer as to what you told her? Page 47. "If the Defendant had told me he had

hit her again, I would have written it down"? Remember that?

A Yes, sir.

Q Remember her making that statement, "she did not tell me that her husband struck the gun or struck her when he slammed the door"? Remember her stating that?

A Yes.

Q Do you remember her saying "Did she say anything (p. 1155) about where she was standing when he slammed the door"?

A Yes, sir, I remember saying that.

Q Page 48. "The Defendant did not mention any physical contact between her and her husband after he pushed her one time". Remember her saying that?

A Yes, sir, I remember her saying that.

Q And Page 52, "she did not tell me what she did with the gun afterward"? Remember that?

A Yes, sir, I remember her saying that.

Mr. Clinger: One moment, please, Your Honor.

By Mr. Clinger:

Q Do you remember telling Dr. Betty Back that you were drinking that night but in your opinion you were not intoxicated?

A Yes, sir, I remember saying that.

Mr. Clinger: Pass the witness, Your Honor.

The Court: Redirect?

Mr. Maglothin: Yes, Sir, a little bit.

(p. 1156) REDIRECT EXAMINATION

By Mr. Maglothin:

Q Vickie, since Mr. Clinger brought up about Dr. Betty Back's testimony, do you remember Dr. Betty Back testifying that she had a PhD in both psychology and neuro-psychology?

A Not specifically.

Q Not specifically? All right. Do you remember her testifying about all the experience she had in hypnosis, that she had worked for the—

Mr. Clinger: Your Honor, I'm going to have to object. The Court's already ruled that the hypnosis was improperly done.

The Court: Hypnosis is out of this.

Mr. Maglothin: Judge, he went into it all through, what she testified to. I would ask the Court to let me proceed just a little bit further.

The Court: This Court made a ruling at least three or four times and you-all know what the ruling is. The ruling is we're not (p. 1157) going into hypnotic enhanced testimony or memory, and in aid of that, I do not want to get back into the hypnosis business again and I don't intend we'll do it because it's not relevant, it's not material. Now, if you want to get, if you want to redirect or re-

habilitate or whatever on what this lady's memory of what Dr. Back testified, that's fine.

Mr. Maglothin: That's what I was going to do, Judge.

The Court: But we're not going back into the hypnosis.

Mr. Maglothin: I agree. What I was trying to do, we were talking about Dr. Betty Back and I was trying to identify who she was, Your Honor, but I'll move on down.

The Court: All right.

By Mr. Maglothin:

(p. 1158) Q Do you recall Betty Back testifying right in that witness stand right there to Mr. Clinger's questions, answer, "she said there was an end table in the corner and that the gun was on it and she explained at that time that the reason there was a gun on the table, she and her husband was working at nights as a watchman, so to speak, for the business that was behind the residence, she said', referring to you, Vickie, "that she picked up the gun because she didn't want him hitting her, shoving her any more, he would not let her out the door, he slammed the door, and then I", referring to Dr. Betty Back, has this in quotes, "the gun went off and he fell and he died". That's Page 46, Line 7 through 20. Do you recall her testifying to that?

A Yes.

Q And that's what you told her; wasn't it, ma'am?

A Yes, sir, I told her that, I told her what happened.

Q All right. Now, Mr. Clinger brought up one point about this interview that you had with Dr. Back. This was prior to you being hypnotized?

A Yes.

Q Now then, do you, after being hypnotized—

Mr. Clinger: Your Honor, objection.

(p. 1159) The Court: Sustained.

By Mr. Maglothin:

Q Page 46, Line 22 and 23, Mr. Clinger asked the question "And the gun went off, then he fell and he died?" Do you recall Dr. Betty Back testifying this way, "And the gun went off and he fell and he died"? Do you recall telling her that?

A Yes.

Q Page 26, Lines 3 through 11, do you recall Betty Back testifying in this very courtroom here, her answer, "Yes, she said that they got along fairly well, that he had never hit her. He had tried once when he was drunk and that the night of the incident was the first time he had gotten rough with her, you know, shoved her, pushed her around, and that he had been drinking that night and that their problems in her, their marriage, had mostly revolved around a drinking problem he had"? Vickie, did he ever try to beat you before or hit you before?

A He tried once, but it wasn't much of anything.

Q In other words, did he miss you?

A Yes.

Q Vickie, Mr. Clinger asked you a number of questions (p. 1160) concerning statements made to police officers when you were—do you recall what time you were brought down to the police station?

A No, sir. They took me down to the police station after they got there. I don't know what time it was.

Q Okay. Do you recall how long you were down there before someone talked to you?

A It wasn't very long, I know it wasn't very long, but I don't know how long it was.

Q Could it have all happened within thirty minutes?

A I couldn't say. I don't know.

Q All right. Now, he asked you about Officer Roles and what his statements said and whether you remembered making that statement. Do you recall Officer—what's that handsome fellow's name—Strickland, Strickland, Officer Strickland testifying that he interviewed you with Officer Roles?

A I remember him saying he had; yes, sir.

Q Okay. And his report has been introduced into evidence?

A Yes.

Q Do you recall in that report that you told them that it was an accident?

A I remember—what it says in the report, I don't (p. 1161) know.

Q Okay.

A I do know I told him it was an accident.

Supreme Court, U.S.
FILED
DEC 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-130

In The
Supreme Court of the United States
October Term, 1986

VICKIE LORENE ROCK,

Petitioner,

vs.

STATE OF ARKANSAS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR PETITIONER

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28pp

QUESTIONS PRESENTED

1. Whether Arkansas's rule of per se inadmissibility of hypnotically refreshed recollection violates due process of law when applied against a defendant in a criminal case whose defense necessarily depended on the recollection of and testimony concerning certain actions not remembered prior to the hypnotically induced refreshing of recollection.

2. Given the constitutionality of limiting a defendant's testimony as to post-hypnotic remembrance, then whether the order of the trial court was unconstitutionally broad, thereby being too restrictive of defendant's testimony, resulting in a denial of due process of law.

3. Given the constitutionality of the limitation of a defendant's testimony with respect to post-hypnotic remembrances, then whether the trial court erred in making arbitrary and inconsistent applications of the rule, which resulted in a denial of due process of law.

PARTIES TO THE PROCEEDINGS[1]

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[1] The caption of the case contains the names of all parties.

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CITATIONS TO OPINIONS AND JUDGMENTS BELOW

The opinion of the Supreme Court of Arkansas is reported at 288 Ark. 566 and at 708 S.W. 2d 78, and is reprinted in full in Appendix A to the Petition for Writ of Certiorari at page i.

The order of the Supreme Court of Arkansas denying a rehearing entered May 27, 1986, is set forth in Appendix A to the Petition for Writ of Certiorari at page xviii.

The judgment of the Circuit Court of Benton County, Arkansas, entered February 22, 1985, is set forth in full in Appendix A to the Petition for Writ of Certiorari at page xvi.

The pre-trial order of the Circuit Court of Benton County, Arkansas, entered December 7, 1984, is set forth in full in Appendix A to the Petition for Writ of Certiorari at page xvii.

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JURISDICTION

The judgment of the Supreme Court of the State of Arkansas was entered on April 21, 1986. A timely petition for rehearing was denied on May 27, 1986. The jurisdiction of the Supreme Court is invoked under 28 USCS § 1257 on the grounds that a right or privilege of the defendant is claimed under the Constitution of the United States which right has been denied by the State.

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States
Amendment 14

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

———o———

STATEMENT OF THE CASE

On July 2, 1983, Frank Rock died from a gunshot wound he received while trying to prevent his wife from leaving their apartment to get a hamburger. His wife, petitioner Vickie Lorene Rock, was charged with manslaughter in connection with the death of her husband. Petitioner employed W. B. Putman, an able and experienced trial attorney, as lead counsel in the case. As petitioner could not recall important details regarding the gun discharging, at the suggestion of and through the arrangements by Mr. Putman, she submitted to hypnosis by Dr. Bettye Back, a licensed neuropsychologist, trained in the field of hypnosis, for the purpose of refreshing her memory. (Appendix A, p. xvii) As a result of the second hypnotic session, petitioner was later able to recall that she did not put her finger on the trigger of the gun, and that the gun discharged completely by accident or mechani-

cal failure of the safety as her husband grabbed her hand during the scuffle. (J.A. 29)

The prosecution made a pre-trial motion to exclude the petitioner's testimony at the trial. A separate pre-trial hearing was held on the prosecution's motion, and at the conclusion of the hearing, the prosecution's motion was granted, and petitioner was ordered not to testify to any facts on the day of the shooting except "matters remembered and stated to the examiner prior to being placed under hypnosis." That hearing took place on November 26, 1984. (Appendix A, p. xvii)

The trial began on December 4, 1984, and on December 6, 1984, the Court was advised of an irregularity in the jury. After hearing in chambers where one juror was found to be impliedly biased, and upon motion by the state and by defendant, the Court declared a mistrial and reset a new trial for February 6, 1985. Six days later, on December 12, 1984, the lead defense counsel, Mr. W. B. Putman, died. The lead of petitioner's defense was assumed by Mr. Putman's partner, E. E. Maglothin, Jr., and his widow, Esther White, and the trial was recommenced on February 6, 1985. (J.A. 1,2)

During direct examination, the trial judge limited petitioner's testimony regarding the shooting in those statements contained in the psychologist's notes made immediately prior to the hypnosis. Petitioner was not permitted to relate to the jury the facts recalled after hypnosis or the facts previously remembered but not contained in the psychologist's notes. With the approval of the trial court, petitioner was examined directly from a copy of the psychologist's notes made prior to hypnosis. (J.A. 96)

Petitioner was convicted by the jury and sentenced by the Court to the maximum punishment allowed for the offense under Arkansas law. (J.A. 2) Petitioner appealed to the Supreme Court of Arkansas, and in the notice of appeal and designation of record, petitioner designated the entire record, "including but not limited to, all pleadings, motions, orders, exhibits, evidence and documents introduced or offered into evidence, instructions accepted, rejected and/or given, the proceedings and a transcription of the entire proceedings had in the Trial Court in the above styled cause, excluding only Voir Dire, Opening Statement and Closing Arguments made to the jury by counsel." A transcription was made by the court reporter and lodged with the Supreme Court of Arkansas with the exception that the pre-trial hearing on the prosecution's motion to limit the petitioner's testimony was not included as part of the transcript. The Supreme Court of Arkansas did not have before it the transcript of the pre-trial hearing; only the cross-examination of the neurophychologist by the prosecuting attorney introduced as an exhibit by the defense. (Transcript)

The brief for petitioner made no attempt to correct or fill in the record pursuant to Rule 6(d) of the Rules of Appellate Procedure. No objection to the incompleteness of the transcript was made by the Attorney General nor was any attempt made to abstract that omitted portion of the transcript. By an opinion delivered April 21, 1986, the judgment of the trial court was affirmed without mention of the missing portion of the transcript. (Appendix A, p. i) Timely petition for a rehearing was denied on May 27, 1986, again without mention of the omitted portion of the transcript either by counsel or by the Court.

(Appendix A, p. xviii) The pre-trial order of the trial court was included in the transcript and was abstracted on appeal.

The points raised here on appeal were specifically raised in a brief submitted to the trial court on October 22, 1984, prior to the entry of the order in question on December 7, 1984, and again in petitioner's brief to the Supreme Court of the State of Arkansas. The failure to transcribe the hearing on which the restrictive order was based is noted here for the first time.

———o———

SUMMARY OF ARGUMENT

The order of the trial court denying petitioner the right to testimony of matters remembered and stated after being placed under hypnosis constitutes a denial of due process of law in that it denied petitioner the right to testify in her own behalf, and improperly limits her right to effective counsel.

The order of the trial court was unconstitutionally broad in limiting the testimony of petitioner to matters remembered and stated to the neuropsychologist prior to being placed under hypnosis.

The order by the trial court was inconsistently applied, and was thereby arbitrary and unreasonable in limiting the actual testimony of petitioner not only to matters remembered and stated to the neuropsychologist, but to matters included in the handwritten notes of the neuropsychologist

and the transcript of the cross examination of the neuropsychologist by the prosecuting attorney at the pre-trial hearing.

———o———

ARGUMENT

I.

PETITIONER WAS DENIED DUE PROCESS OF LAW IN THAT THE PRE-TRIAL ORDER OF THE COURT WAS AN UNCONSTITUTIONAL LIMITATION ON PETITIONER'S RIGHT TO TESTIFY IN HER OWN DEFENSE.

Vickie Rock was denied the right to testify in her own defense as to facts and events that occurred on the day her husband died except those facts and events noted by the hypnotist prior to hypnosis. Petitioner submits that the right of a defendant to testify in her own behalf as to the events which constitute the alleged crime should be nearly absolute. The state suggests that where testimony is thought to be the product of hypnosis the jury should not be allowed to hear and consider such testimony.

Does the state have an overriding interest in excluding the testimony of a criminal defendant concerning post-hypnotic recollection? Petitioner submits that it does not, and that the burden should be on the prosecution to establish that the testimony is likely the product of improper suggestion.

The charge that the petitioner Vickie Rock was defending against was manslaughter. The critical testimony that was excluded concerned the fact that she did not have her finger on the trigger of the gun, nor did she point it at her husband; that the gun discharged by mechanical failure when the deceased grabbed the petitioner's hand. The Arkansas Supreme Court ruled that her failure to testify directly on those points is not significant. The difference between holding a gun with a finger on the trigger prepared to fire and holding a gun with a finger not on the trigger in order to prevent firing of the gun seems enormous when considering the decree of care which petitioner was exercising, a vital element in an issue of manslaughter. The importance of her failure to testify is reflected in the fact that the jury recommended the maximum punishment allowable under Arkansas Law, even though the petitioner had no prior convictions and expressed considerable remorse at the death of her husband.

In order for Vickie Rock's defense to be understood by the jury each part of the testimony was needed, both the testimony of the gun expert, who testified that the gun could and likely would discharge without the trigger being pulled and petitioner's testimony that her finger was never on the trigger of the gun. The jury could clearly have taken those two items of testimony and concluded either that the shooting was accidental or in the alternative, that petitioner's negligence was of a lesser degree than would justify the maximum punishment allowable under state law.

The Arkansas Supreme Court seemed to justify exclusion of that evidence because it was not completely ex-

culpatory, but that reasoning is not a correct interpretation of the constitutional standard as set forth in *In re Oliver,* 333 U.S. 257 (1948), which provides that a defendant in dealing with the charges against him, must have "a reasonable opportunity to meet them by way of defense *or explanation,* have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation." (emphasis added) 333 U.S. at 275.

It is important to note in the instant case, there was no application of a pre-existing state rule of evidence. Indeed, the only law in Arkansas dealing with the subject was the general rule of competency under the uniform rules of evidence. That rule reads as follows:

> "Every person is competent to be a witness except as otherwise provided in these rules." Rule 601, Arkansas Uniform Rules of Evidence.

No Arkansas decision dealt with the limitation of testimony by a criminal defendant based on hypnosis or any other means of jury enhancement such as the use of drugs or any other medical or psychological means of refreshing recollection. A related rule of Arkansas evidence pertaining to the use of a writing or object to refresh memory, allows the testimony even if the object or writing was used prior to the testimony of the witness. Rule 612(b), Arkansas Uniform Rules of Evidence. That rule provides in part:

> . . .
>
> (b) . . . if, before testifying, a witness uses a writing or object to refresh his memory for the purpose of testifying, and the Court in its discretion determines that the interest of justice so require, an adverse party

> is entitled to have the writing or object produced if practicable at the trial, hearing or deposition in which the witness is testifying."

No published decision in Arkansas limits the criminal defendant's right to testify. The decision of the Arkansas Supreme Court then must be construed as resting solely on its conclusion of the unreliability of hypnotically refreshed memory. To treat that testimony as unreliable and accordingly inadmissible in Arkansas, the Arkansas Supreme Court relied on the decision of the California Court in *People v. Shirley*, 31 Cal. 3d 18, 181 Cal. Rptr. 243 (1982). That decision in turn rests very heavily on a law review article written by Bernard L. Diamond, a professor of law at the University of California at Berkeley and a clinical professor of psychiatry at the University of California at San Francisco at the time of the publication of the article. Diamond, *Inherent Problems in the Use of Pre-trial Hypnosis on a Perspective Witness*, 68 California Law Review, 313 (1980).

That article is a strongly worded condemnation of the use of hypnosis in the pre-trial preparation of a perspective witness; however, the article specifically disclaims any relevance to the issue of the defense use of hypnosis on the defendant. In footnote 7 at page 315, Professor Diamond stated:

> "7. The following legal issues concerning the use of hypnosis will not be discussed except insofar as they relate to this topic:
>
> . . .
>
> (c) Defense use of hypnosis on a defendant for the purpose of establishing his innocence or at least eliciting some information helpful to the defense. In

> *People v. Sirhan,* 7 Cal. 3d 710, 497 P. 2d 1121, 102 Cal. Rptr. 385 (1972), for example, I hypnotized the defendant in order to obtain information which might underpin a diminished capacity defense." 68 Cal. Law Rev. at 315.

The California Court made no reference to the clear exception of a criminal defendant's right to testify in his own behalf in the article, but in placing clear limitations on the rule in that case, the Court stated:

> "Second, when it is the defendant himself—not merely a defense witness—who submits to pre-trial hypnosis, the experience will not render his testimony inadmissible if he elects to take the stand. In that case, the rule we adopt herein is subject to a necessary exception to avoid impairing the fundamental right of an accused to testify in his own behalf. [*People v. Robles,* (1970) 2 Cal. 3d 205, 214-215, 85 Cal. Rptr. 166, 466 P. 2d 710.]"

The case relied upon most heavily by the Arkansas Supreme Court, in answering the constitutional argument is *State v. Atwood,* 39 Conn. Sup. 273, 479 A.2d 258 (Conn. Super. 1984). That case was a published opinion of the trial court dealing with a pre-trial motion by the defendant. The defendant claimed amnesia of the events surrounding the murder of his wife and moved that the court issue a pre-trial ruling on the admissibility of his testimony, should he decide to testify after undergoing hypnotism or sodium amytal interview designed to refresh his memory. After finding that defendant had not met his burden of proof in establishing amnesia, the court went on to discuss the issue of hypnosis and only in the final few paragraphs deals with the constitutional issue.

The trial court in *Atwood* rested its entire constitutional decision on *Greenfield v. Robinson*, 413 F.Supp. 1113 (W.D. Va. 1976). But the trial court in *Atwood* apparently misunderstood the issue in *Greenfield v. Robinson*, supra. The *Atwood* court incorrectly noted that in *Greenfield* "the court held that the refusal to permit the defendant to testify *after* hypnosis did not infringe upon his right to due process." (emphasis added) 479 A.2d at 266. A reading of *Greenfield* indicates that the issues involved in *Greenfield* were substantially different from the issue envisioned by the *Atwood* court. Greenfield filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Virginia, alleging among other things that he had been denied due process of law because the trial court refused and the Virginia Supreme Court upheld that refusal to permit defendant to testify while in a hypnotic trance and also refused to permit the defendant's expert witness to testify concerning statements the defendant made to him while in a hypnotic trance. The District Court noted that there was not much evidence to suggest that defendant would testify to anything of any substantial value to the case, and that what would be added would be otherwise completely uncorroborated. The Court then stated that under those peculiar circumstances, Greenfield's due process guarantees were not abrogated by the trial court's refusal to permit Greenfield to relate his story under hypnosis or an expert witness to recount what the defendant told him while under hypnosis.

Contreras v. State, 718 P.2d 129 (Alaska, 1986), dealt with the subject in the context of the identification of a suspect by a prosecution witness whose memory had been

hypnotically enhanced and not with the right of a defendant to testify. Indeed, although the procedure has been in widespread use in Arkansas by law enforcement agencies and prosecuting attorneys for the identification of suspects and the enhancement of memory, not a single Arkansas case has even identified, much less refused, hypnotically refreshed testimony or identification by the prosecution. The line of cases that developed to protect criminal defendants from prosecuting witnesses should not now be used to defeat the due process rights of the petitioner.

The undisputed testimony of the psychologist in this case was that the purpose of the hypnosis session with petitioner was for refreshing petitioner's memory for the assistance of petitioner's attorney in understanding the case for trial preparation. (J.A. 47, 48) The principle objection to allowing petitioner to testify seems to be that after hypnosis, she would invent memory rather than refresh what she really had. or that she cannot be cross-examined effectively because of the expertise of the hypnosis in some way shielding her mind from the rigors of cross-examination. There is no evidence that any such shielding was done in the instant case, but both of these aspects of the State's objection to petitioner's testimony were dealt with in two classic writings on evidence.

In *Basic Problems of Evidence,* Edmund M. Morgan noted that a refreshment of recollection may be done in a number of ways, sometimes even by calling the attention of the witness to something that has no logical connection with the litigation, but most frequently by a writing, and that the danger of a writing is that the witness may substitute the contents of a writing for actual memory. In noting that to allow the trial judge to determine if the

device of refreshing recollection is merely a subterfuge, Professor Morgan suggested that "Except in the most obvious cases, the memorandum will be used and the opponent's protection will lie only in cross-examination. It must be said that in such situations intelligent cross-examination will usually easily disclose whether the witness is relying upon his present memory or upon the memorandum." Morgan, *Basic Problems of Evidence* (A.L.I., 1962), p. 62. Surely the same principal applies here. The danger to the testimony is the same; in the context of due process, the test of intelligent cross-examination is a better means of dealing with invention of testimony under the guise of refreshing recollection than prohibiting the testimony.

The state's position assumes that the hypnotist will not be a true expert, that through his expertise the hypnotist will improperly protect the witness from himself and make him cross-examination proof. This argument of course assumes an untruthful and devious hypnotist. The bias of experts is a long standing problem. As Professor Morgan pointed out: "The abuse of expert opinion evidence in modern litigation in criminal prosecutions . . . has become in many states a scandal, for the expert witness has become in truth an advocate for the party who presents him, rather than as a witness." Morgan, *Practical Difficulties Impeding Reform in the Law of Evidence,* 14 Vand. L. Rev. 725 (1961).

The right to testify in one's own defense in a criminal proceeding lies at the heart of the American ideal of due process of law. *In re Oliver,* supra. Mr. Justice Black writing for the Court identified the minimum essentials of a fair trial in the often quoted sentence:

> "A person's right to reasonable notice of a charge against him and an opportunity to be heard his defense—a right to his day in Court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." 333 U.S. at 273.

Expanding on that same theme, the Court identified the right in slightly different language in *Washington v. Texas,* 388 U.S. 14 (1967):

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." 388 U.S. at 19.

The state has argued that the right to testify is not absolute, but States may not use state rules of evidence to defeat a criminal defendant's right of due process. *Chambers v. Mississippi,* 410 U.S. 283 (1973). In holding that a technical application of the hearsay rule operated to deny the defendant in that case due process of law, the Court noted that, " . . . where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302.

II.

PETITIONER WAS DENIED DUE PROCESS OF LAW IN THAT THE PRE-TRIAL ORDER OF THE COURT WAS AN UNCONSTITUTIONAL LIMITATION ON PETITIONER'S RIGHT TO EFFECTIVE COUNSEL AND THE PREPARATION OF HER DEFENSE.

The second aspect of unconstitutionality in the Arkansas decision is that in adopting the per se inadmissibility rule without distinguishing the rights of a defendant in a criminal case, the decision severely limits the right to meaningful counsel in the preparation of the defense. That right was recognized in an early California case of *Cornell v. Superior Court,* 52 Cal. 2d 99, 338 P.2d 447 (1959). That case involved a proceeding for a writ of mandamus to compel the San Diego authorities to permit the attorney for defendant to have a hypnotist accompany him to examine the defendant. The California court held that the defendant's attorney was entitled to the assistance of the hypnotist, and in so holding, noted that the basic right to counsel was not limited simply to meetings between the client and the counsel. It noted that the right included access to an interpreter, to a psychiatrist, and in general to such expert assistance as might be needed in preparing the defense.

That kind of meaningful consultation and use of hypnosis in meaningful consultation was clearly contemplated as an exception to his objection to the use of pre-trial hypnosis by Professor Diamond. Indeed, Professor Diamond in his article notes that he himself performed pre-trial hypnosis on Sirhan Sirhan for the purpose of attempting to establish a defense. Apparently, no attempt was made in that case to limit the defendant's testimony because of

Dr. Diamond's pre-trial hypnosis of him. *People v. Sirhan*, 7 Cal. 3d 710, 497 P.2d 1121, 102 Cal. Rptr. 385 (1972).

It is certainly not a right of the state to have the defendant's testimony remain in the same form or be limited to what he recalled prior to meaningful consultation with his attorney. In practice, much of the time of the criminal trial attorney is spent reviewing facts with the defendant in order to see that details previously forgotten are remembered, and that defendant's recollection or version of the facts is presented not only correctly, but in a manner to the trier of facts so that the defendant is not likely to be misunderstood or his testimony or recollection misconstrued. The proper preparation of a witness who is to testify is indeed an affirmative obligation of the attorney. The trial judge's decision in this case has the effect of saying to the defense attorney that if he uses certain methods for memory refreshment for the defendant, he may run the risk of preventing his client from testifying at all. The same argument used against hypnosis for memory recollection could be used against other schools of psychiatry or psychology which attempt to either improve or refresh a witness's memory without the use of hypnosis.

Without the information developed by the use of hypnosis on petitioner, the defense attorneys would never have known the safety device and trigger were defective and that the gun discharged without her pulling the trigger. The information was the basis for having certain tests done, which in turn led to expert testimony which proved very conclusively that the gun was susceptible of being discharged without pulling the trigger. These characteristics of the gun were not discovered and would not have been meaningful without the recollected memory. It is

submitted that petitioner as a matter of right was entitled not only to testify to the jury that the gun could discharge without her having pulled the trigger, but that in fact she believed that such was the case.

In concluding its discussion of the due process issue, the Arkansas Supreme Court stated "any prejudice or deprivation caused to appellant in this case was minimal and resulted from her own actions and not by any erroneous ruling of the court", (Appendix A to the petition, page xiv). That statement ignores the fact that the hypnotic session with the defendant was lawful. It was not prohibited by the Uniform Rules of Evidence. The procedure was not prohibited or even discouraged under the Code of Professional Responsibility for Attorneys. It also ignores the fact that nothing in Arkansas law required the disclosure by defendant or defendant's counsel prior to the trial that the hypnotic session had been held. Rule 18, Arkansas Rules of Criminal Procedure. Petitioner submits the suggestion of self-induced error is singularly inappropriate under the circumstances and the Arkansas Supreme Court's result is too harsh to be tolerated within the context of due process of law.

The state has argued.[1] and the Arkansas Supreme Court implied[2] in its opinion that petitioner's defense coun-

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[1] The state argued that "her difficulties in testifying at the trial were engendered by her trial counsel's reckless, headlong plunge into the controversial area of hypnotically refreshed testimony without permission from or even notice to the trial court." Brief for Appellee at the Arkansas Supreme Court, page 10.

[2] The Supreme Court noted " . . . any prejudice or deprivation caused to appellant in this case was minimal and resulted from her own actions and not by any erroneous ruling of the court." 288 Ark. at 580, Appendix A to the petition, page xiv.

sel did something improper and without precedent. Mr. Putman's actions were complete consistent with procedure tacitly approved by the Arkansas Supreme Court more than twenty months prior to the hypnotic session arranged by Mr. Putman, and was consistent with the right to testify guaranteed by the Arkansas Constitution, Article 2, Section 10.[3] Certainly the state cannot hold Mr. Putman to a more rigid standard than it holds the prosecution.

The right to effective counsel and the right to prepare are clearly a part of due process under the Fourteenth Amendment. *Glasser v. United States*, 315 U.S. 60 (1942), *In re Oliver*, supra. Petitioner submits that the decision of the Arkansas Supreme Court if allowed to stand would greatly curtail that right.

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[3] In *Clines v. State*, 280 Ark. 77, 656 SW 2d 684 (1983) a capital murder case arising in the same circuit court with the same prosecuting attorney as the instant case, the prosecuting attorney had two key eye-witnesses hypnotized to enhance their testimony without disclosing that fact to the court or to defense counsel. Both witnesses testified and defendants were convicted and sentenced to death. After the case had been appealed to the Arkansas Supreme Court, but before any decision had been made, one of the defense counsel, an associate of Vickie Rock's attorney, W. B. Putman, learned of the hypnosis and filed a motion with the Arkansas Supreme Court to stay the appellate proceedings and to remand for an evidentiary hearing on the newly discovered evidence on the basis of *People v. Shirley*, supra. By order entered January 10, 1983, the motion was denied without opinion. On July 5, 1983, the Arkansas Supreme Court affirmed the convictions without mention of the hypnosis issue raised. On July 21, 1983, the defendant's moved for a rehearing which was denied on October 3, 1983, without opinion.

III.

THE LIMITATION OF PETITIONER'S TESTIMONY TO PRE-HYPNOTIC STATEMENTS MADE TO THE HYPNOTIST WAS ARBITRARY AND UNREASONABLE TO THE EXTENT THAT IT VIOLATED DUE PROCESS OF LAW.

The exact wording of the pre-trial order, that Vickie Rock could "testify to matters remembered and stated to the examiner prior to being placed under hypnosis" (Appendix A to the petition, page xvii) leaves an extremely puzzling question in its wake, and that is, why limit her testimony only to those things she said to the hypnotist as opposed to statements made to the police, or her lawyers, or her psychologist, all of which could be easily dated. The trial court did not attempt to explain what the special significance of the pre-hypnotic statement made to the neuropsychologist was that caused it to rely on that as a basis for the limitation as opposed to any of the other numerous pre-hypnotic statements made by Vickie Rock. The Arkansas Supreme Court makes no attempt to explain the significance.

The ruling in that sense places the hypnotist in the really unique position of determining prior to the hypnotic session what matters the jury will be allowed to hear, a role for which she is not trained and which she did not in any way anticipate. The future application of the rule would obviously inject the hypnotist into the trial process in a way for which there are no safeguards against abuse by either the state or the defense.

The attempt by defense counsel to introduce a pre-hypnotic statement made to the police as a basis for the expansion of her testimony was refused by the trial court.

(J.A. 105) The refusal was upheld by the Arkansas Supreme Court on the basis that the statement was made after a motive to falsify had arisen. (Appendix A to the petition, pages xiv, xv) The Court did not discuss or attempt to explain why that pre-hypnotic statement was less reliable as an indicator of pre-hypnotic memory than the statement to the hypnotist. There appears to be a determination that establishment of pre-hypnotic memory was not the purpose of the exhibit, but the offer by counsel clearly indicates that it was. (J.A. 104, 105) There is no explanation as to why much earlier statements made to two police officers (J.A. 3) were considered less reliable as indicators of her pre-hypnotic memory.

In short, the selection of the hypnotist's pre-hypnotic interview as the sole reference as to what was pre-hypnotic and what was post-hypnotic memory was without any legal, logical or psychological basis, and as such is arbitrary and lacking in basic fairness to petitioner. Arbitrary rules that deny a defendant the ability to present a defense, especially when based on some *a priori* categorization are clearly violative of the Constitution. *Washington v. Texas*, 388 U.S. 14 (1967).

IV.

THE APPLICATION OF THE PRE-TRIAL ORDER AT THE TRIAL DENIED PETITIONER DUE PROCESS OF LAW.

One good measure of the soundness of a rule is the amount of confusion it causes in the attempt to enforce it. Nowhere is that more evident than in the attempt by the trial judge to enforce the pre-trial order.

When Vickie Rock began to testify about the events surrounding the death of her husband, her testimony was

repeatedly interrupted by objections from the prosecuting attorney on the basis of violation of the pre-trial order. With almost every objection, the trial court redefined the limits of the order.

On the first objection by the prosecutor on grounds of violation of the order, the Court redefined the excluded matter as anything not included in the pre-hypnotic session as far as the day of the crime was concerned. (J.A. 11) On the second, the Court said she would be limited to matters she recalled at the time of the pre-hypnotic sessions whether it was in the statement or not. (J.A. 13) The Court then said that it would be limited to what was in the hypnotist's notes. (J.A. 13) On the next objection, the limit changed to what she recalled and told the doctor. (J.A. 15) The next description was that "she not be allowed to testify to things that she now remembers that she did not remember prior to being placed under hypnosis." (J.A. 16) The next restatement was to limit the testimony to the notes taken by the psychologist and the testimony given by her at the pre-trial hearing. (J.A. 17) On the next objection the Court returned to the wording of the pre-trial order. (J.A. 24) Next, the Court limited the testimony in time to things occurring prior to the discharge of the gun (J.A. 35), and finally returned to limiting the testimony to what was in the notes. (J.A. 36)

Nearly all of the interchanges between the trial court and counsel took place with petitioner on the witness stand and in sight of the jury. (J.A. 11-J.A. 20) Much of the interchange took place within the hearing of the jury. (J.A. 16-J.A.20).

Finally, the trial court permitted the prosecuting attorney to re-cross examine Vickie Rock on her recollection

of the testimony of the psychologist at the post-hypnosis, pre-trial hearing. (J.A. 113-J.A. 120)

With at least nine changes in the limitation of her testimony and the experience of being cross-examined on her memory of the psychologist's testimony at a pre-trial hearing, it is not surprising that petitioner would have extreme difficulty in trying to explain her case to the jury. The verdict shows what the jury perceived.

The trial court was trying to be fair, but no matter how hard he tried, the fairness was lacking because the rule he was trying to enforce was patently unenforceable. The effort itself caused the proceeding to lack basic fairness, and that fairness is required by the Constitution. *In re Oliver,* 333 U.S. 257 (1948). Accordingly, petitioner should be granted a new trial even if the Arkansas evidentiary rule is allowed to stand.

———o———

CONCLUSION

The judgment of the Supreme Court of Arkansas should be reversed and a new trial granted for Petitioner.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

VICKIE LORENE ROCK ..... *Petitioner*

VS.

STATE OF ARKANSAS ..... *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. 86-130

VICKIE LORENE ROCK ..... *Petitioner*

vs.

STATE OF ARKANSAS ..... *Respondent*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Respondent, the State of Arkansas, is in general agreement with statement of the case made by petitioner Rock. However, respondent Arkansas wishes to correct two inaccurate statements made by petitioner Rock in her statement of the case. Respondent Arkansas notes that Rock *was* permitted at trial to relate to the jury certain facts that were not contained in her hypnotist's intake notes. Respondent Arkansas notes further that *not* all of the points raised in Rock's brief on the merits were raised at the trial court level or argued to the Arkansas Supreme Court. Those issues that are procedurally barred will be discussed in respondent's argument section.

SUMMARY OF THE ARGUMENT

Hypnotically refreshed testimony is inherently unreliable. Such testimony is based on the enhancement, while under hypnosis, of an individual's memory. According to the overwhelming weight of eminent scientific authority, individuals under hypnosis are very vulnerable to suggestion, feel compelled to remember events in the way that would please the hypnotist and are prone to fabricate details of the event that they are asked to remember. These dangers are increased when the individual has a motive for remembering the events that are the subject of the hypnotic session in a particular way. Use of certain procedural safeguards during hypnosis does not prevent the subject's recollection from becoming inaccurate. Hypnotic refreshment of memory leads to a firm conviction on the part of the hypnotized subject that the events that were the subject of the hypnotic session actually occurred in the way the subject remembered them while hypnotized.

Criminal defendants do not have an absolute right, guaranteed by the Due Process Clause of the Fourteenth Amendment, to testify in whatever manner they please. Due process is not a license to deceive the jury, albeit unintentionally. Given the facts of the instant case, Arkansas' interest in safeguarding the truth-finding ability of Rock's jury, thereby insuring that the jury's verdict would be based on the collective, reasoned judgment of the jurors, should outweigh Rock's right to present to the jury, by her own testimony, inherently unreliable, exculpatory evidence. *See Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973).

Rock's argument concerning Arkansas' interference with her right to effective assistance of counsel is moot. In any case, this Court has no jurisdiction to hear and decide this argument. This Court has no jurisdiction because Rock did

not raise this point before the Arkansas Supreme Court. *Beck* v. *Washington*, 369 U.S. 541, 549-54 (1962). Furthermore, Rock has failed to show any prejudice she suffered as a result of the alleged interference.

The trial court applied its pretrial order restricting Rock's testimony so loosely that Rock was able to testify based upon sources other than her hypnotist's intake notes. The trial court did not apply its pretrial order restricting Rock's testimony in an arbitrary way. *Washington* v. *Texas*, 388 U.S. 14, 22 (1967).

Rock's other arguments were not raised at the trial level or were not asserted before the Arkansas Supreme Court. Given Rock's failure to obtain a decision on these cases in state court, this Court lacks jurisdiction to hear and decide these claims. *Cardinale* v. *Louisiana*, 394 U.S. 437, 438-39 (1969).

ARGUMENT

I.

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW IN THAT THE PRETRIAL ORDER OF THE COURT WAS NOT AN UNCONSTITUTIONAL LIMITATION ON PETITIONER'S RIGHT TO TESTIFY IN HER OWN DEFENSE.

A. *Introduction.*

Petitioner Rock argues that the trial court violated her Sixth and Fourteenth Amendment due process right to testify in her own defense when it limited the testimony she could present at trial. The trial court limited Rock's testimony because her memory of the events in question had been enhanced by hypnosis. According to the trial court, hypnosis had made Rock's memory of the events leading up to her husband's death unreliable. (Rock's petition for certiorari at xvii) The trial court's pretrial order indicated that Rock could testify only to those facts she told her hypnotist, Dr. Bettye Back, just before Back hypnotized her. At trial, the trial court applied its order in a very lenient way that permitted Rock to recount facts that were not in the notes taken by Dr. Back. (J.A. 36) Respondent Arkansas respectfully submits that the trial court's belief in the complete unreliability of Rock's hypnotically bolstered memory was well founded. Respondent Arkansas respectfully submits that the inherent unreliability of hypnotically enhanced memory and in-court testimony based thereon pose a threat to the truth-finding function of juries. Hypnotically refreshed testimony has such a potentially corrupting effect on the ability of jurors to detect the truth that states may limit the due process right of criminal defendants to testify in their own defense; such a restriction should be tailored to limit only that part of the defendant's testimony

that was the product of hypnotic refreshment. At the very least, if states may not bar a criminal defendant's hypnotically enhanced testimony, then due process concerns do not keep states from requiring, as a matter of their respective witness competency statutes or case decisions, that criminal defendants be hypnotized in accordance with strict guidelines before being allowed to give hypnotically enhanced testimony to a jury. To show the utter unreliability of hypnotically refreshed testimony, some examination of the many lower court decisions on point is necessary as well as a brief description of the hypnotic state.

There is no single, generally accepted definition of the hypnotic state nor is there a single, agreed upon underlying theory that explains it. B. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 Cal. L. Rev. 313, 316-21 (1980) (hereinafter cited as Diamond, *Inherent Problems*). At a minimum, hypnosis involves a cooperative subject and a hypnotist. The hypnotist performs some kind of induction procedure in order to bring about the hypnotic state. During the induction of the hypnotic state the hypnotist invites the subject to suspend his critical judgment and be open to suggestion. The hypnotic state is achieved when the subject successfully accomplishes a series of test suggestions involving alteration of perception, motor control or memory. The subject is truly hypnotized when the responses to the hypnotic suggestions are experienced by the subject as real and involuntary. In summary, hypnosis involves the focusing of attention; increased responsiveness to suggestion; suspension of disbelief with a lowering of critical judgment; potential for altering perception, motor control or memory in response to suggestion; and the subjective experience of responding involuntarily. Council on Scientific Affairs, A.M.A., *Scientific Status of Refreshing Recollection by the Use of Hypnosis*, 253 J.A.M.A. 1918, 1919 (1985); *see also* IX Encyclopaedia Britannica, *Hypnosis*, 133, 136-37 (15th ed. 1974).

The lower court cases discussing the admissibility of hypnotically refreshed testimony fall into three categories: (1) hypnotically refreshed testimony held admissible; (2) hypnotically refreshed testimony held admissible if certain procedural safeguards were in place during the hypnotic session; and (3) hypnotically refreshed testimony held inadmissible. Decisions in the third category of cases do not hold that witnesses who have had their memories hypnotically enhanced are totally incompetent to testify — these courts permit a hypnotically refreshed witness to testify to events that the witness could remember *before* undergoing hypnosis. In the following subsections these three categories of cases will be discussed.

B. *Admissibility of hypnotically refreshed testimony in lower federal and state courts.*

1. *Complete admissibility.*

Ten federal or state lower courts have held that hypnotically enhanced testimony is admissible with no restriction on the hypnotically refreshed witness' testimony. The pertinent decisions of these courts are as follows: *Beck* v. *Norris*, 801 F.2d 242, 244-5 (6th Cir. 1986); *United States* v. *Awkard*, 597 F.2d 667, 669 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979); *United States* v. *Adams*, 581 F.2d 193, 198 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978); *Kline* v. *Ford Motor Co., Inc.*, 523 F.2d 1067, 1069-70 (9th Cir. 1975); *Wyller* v. *Fairchild Hiller Corp.*, 503 F.2d 506, 509 (9th Cir. 1974); *United States* v. *Waksal*, 539 F.Supp. 834, 838 (S.D. Fla. 1982), *rev'd on other grounds*, 709 F.2d 653 (11th Cir. 1983); *United States* v. *Narciso*, 446 F.Supp. 252, 277-82 (E.D. Mich. 1977); *People* v. *Smrekar*, 68 Ill. App. 3d 379, 385 N.E.2d 848, (1979); *State* v. *Wren*, 425 So.2d 756, 759 (La. 1983); *State* v. *Brown*, 337 N.W.2d 138, 151 (N.D. 1983);

State v. *Jorgensen*, 8 Or. App. 1, 9, 492 P.2d 312, 315 (1971); *State* v. *Glebock*, 616 S.W.2d 897, 903-04 (Tenn. Crim. App. 1981); *Chapman* v. *State*, 638 P.2d 1280, 1282 (Wyo. 1982); *see also* Oregon Rev. Stat. § 136.675 (Repl. 1985); *see generally* Annot., 92 A.L.R.3d 442 (1979) (collecting cases); E. Cleary, *McCormick on Evidence* § 206(C) (1984 3rd ed.) (collecting cases); and P. Giannelli and E. Imwinkelried, *Scientific Evidence* §§ 12-3-4(C) (1986) (collecting cases) (hereinafter cited as Giannelli, *Scientific Evidence*).

When synthesized, these cases establish a rule of general admissibility for hypnotically refreshed testimony. These cases consider hypnosis simply a means to stimulate a witness's memory just like any other means — for example, a writing or a unique sound or odor. These cases hold that cross-examination of the hypnotically enhanced witness, presentation of expert testimony by the adverse party explaining to the jury the capacity of hypnosis to distort memory and proper cautionary instructions to the jury are all that is necessary to safeguard the jury's truth-finding ability. According to these cases, hypnotic enhancement of testimony goes to the weight, not the admissibility, of the testimony.

The continuing authority of many of these cases is dubious because they were decided before several eminent authorities in the field of hypnosis published articles, in which they state that hypnotically refreshed testimony is unreliable. Giannelli, *Scientific Evidence* at 359. Indeed, state supreme courts in Maryland and North Carolina both overruled earlier cases holding that hypnotically enhanced testimony was unconditionally admissible with subsequent decisions holding that hypnotically bolstered testimony is inadmissible, but both courts permit a hypnotically refreshed witness to testify on the basis of his or her pre-hypnosis memory. *Collins* v. *State*, 296

Md. 670, 464 A.2d 1028 (1983), *overruling Harding* v. *State*, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969) and *State* v. *Peoples*, 311 N.C. 515, 532, 319 S.E.2d 177, 187 (1984), *overruling State* v. *McQueen*, 295 N.C. 96, 119-22, 244 S.E.2d 414, 427-29 (1978). *Harding*, a 1968 decision, was an especially influential case that other jurisdictions relied on in concluding that hypnotically enhanced testimony was admissible. A factor in the North Carolina Supreme Court's decision to overrule *McQueen* was the decision of the Maryland Supreme Court to overrule *Harding*. *Peoples*, *supra*, 311 N.C. at 532, 319 S.E.2d at 187.

Furthermore, the use of hypnosis is not akin to other methods of refreshment of memory — the process of placing a subject under hypnosis, by definition, renders the subject highly suggestible. This heightened state of suggestibility makes the subject more vulnerable to suggestion than he would be otherwise and thereby increases the chance that the subject will recall events inaccurately. *See People* v. *Hughes*, 466 N.Y.S.2d 255, 265, 453 N.E.2d 484, 494 (1983). In addition, the assumption that cross-examination acts as a kind of scalpel that cuts through deception and irrelevancy and gets to the truth does not obtain for witnesses whose memories have been hypnotically refreshed. Hypnotic enhancement blunts cross-examination. It does so by producing in the witness a firm belief in the accuracy of his recollection of the events in question. When the witness truly believes in the truth of his testimony, he projects outward, indicia of his belief in the truth of his testimony; the core of the jury system is the assumption that jurors can evaluate testimony for its truthfulness based, in part, on their common sense understanding of these outward manifestations of credibility. *Ballew* v. *Georgia*, 435 U.S. 223, 232-33 (1978). Jurors cannot rely on the outward manifestations of credibility given off by hypnotically enhanced witnesses. *See People* v. *Shirley*, 181 Cal. Rptr. 243, 272, 641

P.2d 775, 803-04, *cert. denied*, 459 U.S. 860 (1982); *State* v. *Martin*, 101 Wash.2d 713, 722, 684 P.2d 651, 656 (1984); Diamond, *Inherent Problems* at 339-40; and M. Orne, *The Use and Misuse of Hypnosis in Court*, 27 Internat. J. of Clinical and Experimental Hypnosis 311, 320, 327, 332 (1979) (hereinafter cited as Orne, *The Use and Misuse*).

2. *Procedural safeguards cases.*

Ten lower courts admit hypnotically enhanced testimony if the witness was hypnotized in accordance with certain procedural safeguards. The pertinent decisions are as follows: *Sprynczynatyk* v. *General Motors*, 771 F.2d 1112, 1119-23 (8th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 1263, 89 L.Ed.2d 572 (1986); *United States* v. *Harrington*, 18 M.J. 797, 803 (A.C.M.R. 1984); *United States* v. *Valdez*, 722 F.2d 1196, 1203 (5th Cir. 1984); *Idaho* v. *Iwakiri*, 106 Idaho 618, 625-26, 682 P.2d 571, 578-79 (1984) (*applying a modified procedural safeguards analysis*); *Pearson* v. *State*, 441 N.E.2d 468, 473 (Ind. 1982); *House* v. *State*, 445 So.2d 815, 826-27 (Miss. 1984); *State* v. *Hurd*, 86 N.J. 525, 432 A.2d 86 (1981); *State* v. *Beachum*, 97 N.M. 682, 689-90, 643 P.2d 246, 253-54 (N.M. App. 1981), *writ quashed*, 98 N.M. 51, 644 P.2d 1040 (1983); *State* v. *Weston*, 16 Ohio App.3d 279, 287, 475 N.E.2d 805, 813 (1984); *State* v. *Armstrong*, 110 Wisc. 2d 555, 571-73, 329 N.W.2d 386, 394-95, *cert. denied*, 461 U.S. 946 (1983). The leading case of this line is the New Jersey Supreme Court's *Hurd* decision.

In *Hurd* the New Jersey Supreme Court held that hypnotically refreshed testimony was so unreliable that it could not be admitted into evidence unless six procedural safeguards were employed during the hypnotic session. However, before determining whether the safeguards were observed, a trial court must first determine whether the use of hypnosis is appropriate for the kind of memory loss suffered by the subject. Once the trial court determines that the subject's

memory loss can be remedied by hypnosis, then the trial court is to determine whether the procedural safeguards were observed. These safeguards are: 1) a psyciatrist or psychologist experienced in the use of hypnosis must conduct the hypnotic session; 2) the psychiatrist or psychologist should be independent of the government and the defense and not regularly employed by either; 3) any information given to the hypnotist by the government or defense counsel must be recorded in writing or in a suitable form; 4) before inducing hypnosis, the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them — in obtaining this description the hypnotist should avoid influencing it; 5) all contacts between the hypnotist and the subject must be recorded — videotape is strongly encouraged and 6) only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and post-hypnotic interview. The party proffering the hypnotically refreshed testimony must establish its reliability by clear and convincing evidence.

The *Hurd* approach of erecting procedural safeguards cannot guarantee that hypnotically refreshed testimony will be reliable. In the first place, the safeguards themselves simply are not adequate. *See People* v. *Shirley*, 181 Cal. Rptr. 243, 255 n.24, 641 P.2d 775, 787 n.24, *cert. denied*, 459 U.S. 860 (1982). Furthermore, the *Hurd* safeguards do not prevent a subject from losing his critical judgment, do not prevent confusion between actual memory and confabulated, false memories and do not prevent the subject's projection of complete belief in the accuracy of his post-hypnosis memory. *Shirley*, *supra* and *People* v. *Gonzales*, 415 Mich. 615, 624, 329 N.W.2d 743, 746-7 (1982), *modified on other grounds*, 417 Mich. 968, 336 N.W.2d 751 (1983). Moreover, use of the *Hurd* procedural safeguards approach has enormous potential to delay the criminal justice system at trial and by interlocutory appeal, given its reliance on expert testimony, on special hearings and on the ability of trial judges to make difficult decisions on the basis of their

understanding of complex scientific issues relating to the processes of memory. *State ex rel. Collins* v. *Superior Court*, 132 Ariz. 180, 208, 644 P.2d 1266, 1294 (1982) and *Shirley*, *supra*.

With respect to the facts of the instant case, respondent Arkansas submits that the *Hurd* safeguards were not strictly followed and that the Arkansas Supreme Court so held. *Rock* v. *State*, 288 Ark. 566, 573-74, 708 S.W.2d 78, 82 (1986). In the first place, Dr. Bettye Back had been employed by Rock's trial attorney in the past, a violation of the second *Hurd* safeguard. (T. 993-94) Dr. Back also admitted that Rock's trial attorney had told her *over the telephone* certain information about Rock, a violation of the third *Hurd* safeguard. (J.A. 60-2). Dr. Back's version of what Rock's trial counsel said is no substitute for an accurate tape recording of the information that counsel conveyed to her. Finally, the fifth *Hurd* safeguard states that *all* contacts between the subject and the hypnotist should be recorded, videotaped if possible. Dr. Back did not videotape any of her contacts with Rock, although she made an audiotape of the hypnotic sessions (which she admits is difficult to understand). Dr. Back did not even audiotape any of her pre-hypnosis, information — taking interviews with Rock. (J.A. 51-3; J.A. 80; T. 996-97)

Finally, *Hurd* notes that an important factor that a trial court should consider in determining whether the victim's memory loss is the sort that can be helped by hypnotic enhancement is whether the subject had a motive for remembering a particular version of the events in question. *Hurd*, *supra*, at 86 N.J. at 544, 432 A.2d at 96. Rock was aware, before she was hypnotized, that she was undergoing the process at her lawyer's insistence to help her remember what occurred when she shot her husband. (J.A. 47-8; J.A. 80; T. 1002)

If this Court were to decide that due process of law

requires that defendants in criminal cases be allowed to testify if *Hurd*-like procedural safeguards were employed while the defendant was hypnotized, then Rock's due process right to testify in her own defense was not violated at her trial. Rock's right to testify in her own defense was not violated because the *Hurd* safeguards were not properly employed when Dr. Back hypnotized her in order to refresh her recollection of the events leading up to her husband's death.

3. *General inadmissibility cases*

Twenty-two lower courts hold that hypnotically refreshed testimony is inadmissible. The pertinent decisions are as follows: *Prewitt* v. *State*, 460 So.2d 296, 302-304 (Ala. Crim. App. 1984); *Contreras* v. *State*, 718 P.2d 129, 138 (Alaska 1986); *State ex rel. Collins* v. *Superior Court*, 132 Ariz. 180, 193-211, 644 P.2d 1266, 1279-97 (1982); *State* v. *Mena*, 128 Ariz. 226, 231, 624 P.2d 1274, 1279 (1981); *Rock* v. *State*, 288 Ark. 566, 708 S.W.2d 778 (1986); *People* v. *Guerra*, 208 Cal. Rptr. 162, 690 P.2d 635 (1985); *People* v. *Shirley*, 181 Cal. Rptr. 243, 254-55, 641 P.2d 755, 786-87, *cert. denied*, 459 U.S. 860 (1982); *People* v. *Quintanar*, 659 P.2d 710, 711 (Colo. App. 1982); *State* v. *Atwood*, 479 A.2d 258 (Conn. 1984); *State* v. *Davis*, 490 A.2d 601, 605 (Del. 1985); *Bundy* v. *State*, 471 So.2d 9, 18 (Fla. 1985); *cert. denied*, ___ U.S. ___, 107 S.Ct. 295, 93 L.Ed. 2d 269 (1986) (Brennan, J. dissenting from denial); *State* v. *Moreno*, 709 P.2d 103 (Hawaii 1985); *State* v. *Haislip*, 701 P.2d 909 (Kan. 1985); *State* v. *Collins*, 296 Md. 670, 701-02, 464 A.2d 1028, 1044 (1983): *Commonwealth Kater*, 388 Mass. 519, 447 N.E.2d 1190, 1195 (1983); *People* v. *Gonzales*, 415 Mich. 615, 627, 329 N.W.2d 743, 748 (1982), *modified on other grounds*, 417 Mich. 968, 336 N.W.2d 751 (1983); *State* v. *Ture*, 353 N.W.2d 502, 513 (Minn. 1984); *State* v. *Mack*, 292 N.W.2d 764, 772 (Minn. 1980); *Alsbach* v. *Badar*, 700 S.W.2d 823 (Mo. 1985); *Palmer* v. *State*, 210 Neb. 206, 218, 313 N.W.2d 648, 655 (1981); *People* v.

Hughes, 466 N.Y.S.2d 255, 261-65, 453 N.E.2d 484, 490-95 (1983); *Robison* v. *State*, 677 P.2d 1080, 1085 (Okla. Crim. App.), *cert. denied*, 467 U.S. 1246, (1984); *Commonwealth* v. *Nazarovitch*, 496 Pa. 97, 436 A.2d 170 (1981) and *State* v. *Martin*, 101 Wash.2d 713, 722, 684 P.2d 651, 654 (1984).

According to these lower court authorities, testimony based on the hypnotic enhancement of a witness' memory is so unreliable that it is not admissible into evidence. Ultimately, these cases rest on the views of a number of scientific experts, notably Drs. Martin Orne and Bernard Diamond, who have written a great deal on the subject of hypnotically refreshed testimony. These cases do not hold, and the Arkansas Supreme Court did not hold, that a hypnotically refreshed witness is totally incompetent and cannot testify at all. The above jurisdictions permit hypnotically refreshed witnesses to testify to those events that the witness can prove he or she was able to remember before hypnosis or to events that are unrelated to the events that were the subject of hypnosis. *Cf. Shirley, supra*, 181 Cal. Rptr. at 273, 641 P.2d at 805 *with Martin, supra*, 101 Wash. 2d at 222, 684 P. 2d at 656 and *State ex rel. Collins, supra*, 132 Ariz. at 209, 644 P.2d at 1295; *see* Giannelli, *Scientific Evidence, supra*, at 357 nn. 51-4.

Although the above cases all hold that hypnotically refreshed testimony is inherently unreliable and so hold on the basis of expert opinion, they do not all apply the same evidentiary analysis to exclude it. Some jurisdictions apply a "probative value versus unfair prejudice" balancing test like that found in FRE 403 and others apply the holding of *Frye* v. *United States*, 293 F. 1013 (D.C. Cir. 1923). *See* Giannelli, *Scientific Evidence, supra* at § 1-5(E), nn. 117-18. *Frye* holds, in essence, that the results of scientific tests are admissible only if they are produced by scientific techniques that are generally accepted by the relevant scientific community. Respondent Arkansas will not address the *Frye* rule because the Arkansas

Supreme Court found hypnotically refreshed testimony inadmissible as a matter of the *Frye* test or of the "balancing test" approach of FRE 403. *Rock, supra,* 288 Ark. at 570, 708 S.W.2d at 80 [on the *Frye* standard generally, *see* E. Cleary, *McCormick on Evidence* § 203 (3d ed. 1984) and Giannelli, *Scientific Evidence, supra,* at §§ 1-5-5(F)].

The expert opinions most frequently relied on are set forth in M. Orne, *Use and Misuse, supra* and B. Diamond, *Inherent Problems, supra; see also* M. Orne, D. Soskis, D. Dinges and E. Orne, *Hypnotically Induced Testimony* in Eyewitness Testimony: Psychological Perspectives, V171 (G. Wells and E. Loftus eds. 1984) and M. Orne, D. Soskis, D. Dinges and E. Orne, *Hypnotically Refreshed Testimony: Enhanced Memory or Tampering with Evidence?* (United States Dept. of Justice, Nat. Institute of Justice, Issues and Practices in Criminal Justice series 1985). These experts state that hypnotically refreshed testimony is inherently unreliable because the hypnotized subject is vulnerable to hypersuggestibility, hypercompliance and confabulation.

By definition, when subjects are hypnotized, they are extremely receptive to suggestions given by the hypnotist. *Shirley, supra,* at 181 Cal. Rptr. at 271, 641 P.2d at 802. Suggestions from the hypnotist may come in unintended forms — requests for predictions from the hypnotist or the unconscious nonverbal behavior of the hypnotist. Dr. Back acknowledged this hazard in her testimony. (J.A. 50-1; 70) A classic example of hypersuggestiveness occurred in the instant case when Rock remembered cocking the hammer on the pistol she used to shoot her husband. At J.A. 94-5 Dr. Back admitted that when she hypnotized Rock a second time and asked her if she had cocked the hammer on the pistol, Rock replied that she had. At J.A. 73-7 Dr. Back admitted that when she hypnotized Rock for the first time she did not ask her if she had cocked the hammer on the pistol because she, Dr. Back, did not know

enough about pistols to know that some pistols did not have to be cocked. Before the second hypnotic session Rock had never mentioned cocking the pistol. (J.A. 75) After the second hypnotic session, after Dr. Back had learned that only *some* pistols have to be cocked, Rock was able to "remember" that she had cocked the pistol. (J.A. 95) Had Dr. Back never learned from an outside source that only some pistols have to be cocked, Rock would never have "remembered" such a detail.

Hypercompliance is another way in which hypnotically refreshed memory can be rendered inaccurate. Subjects under hypnosis may feel compelled to please the hypnotist or others who have told the subject that it is important that he or she remember accurately. *See Gonzales, supra,* 415 Mich. at 624, 329 N.W.2d at 746 and *State* v. *Hurd,* 86 N.J. 525, 539, 432 A.2d 86, 93 (1981). Rock knew that her lawyers wanted to have her hypnotized so she could remember the details surrounding her husband's death in an effort to help them prepare her defense. (J.A. 48; J.A. 80; J.A. 110) Rock must have felt a compelling desire to assist her attorney and was, therefore, vulnerable to hypercompliance. Dr. Back admitted that a subject's motivation may affect how the subject responds during hypnosis and that hypercompliance is possible. (J.A. 80; J.A. 86-7)

Finally, hypnotized subjects are likely to confabulate. Confabulation occurs when a subject under hypnosis, unable to remember specific details, simply fantasizes an answer to complete his or her story. *See State ex rel. Collins, supra,* 132 Ariz. at 201, 644 P.2d at 1270-71. Dr. Back admitted that subjects under hypnosis can confabulate, and that confabulated statements are difficult to detect without independent verification. (T. 978-79; T. 984) Dr. Back admitted that she did not independently verify any of the information that Rock gave her. (T. 978-89) Indeed, the crucial events surrounding Rock's husband's death could never have been independently verified because Rock's husband had died and because Rock could not independently remember the details.

Respondent Arkansas submits that hypersuggestibility, hypercompliance and confabulation all make a hypnotized subject's memory of an event completely unreliable. If the subject's memory becomes unreliable then, perforce, the subject's subsequent in-court testimony, based upon his hypnotically enhanced memory, is unreliable. Arkansas, like all the states and the United States, structures its rules of evidence to keep unreliable evidence from the jury in a criminal trial. Respondent Arkansas submits that the due process clause of the Fourteenth Amendment does not prohibit Arkansas from establishing a rule of partial witness incompetency with respect to hypnotically refreshed testimony and applying such a rule to criminal defendants.

C. *The defendant's due process right to testify in her own defense.*

Respondent Arkansas asserts that Rock's hypnotically refreshed testimony was inherently unreliable. Respondent Arkansas asserts that the Arkansas Supreme Court's *Rock* decision is an appropriate evidentiary limitation on the competency of a hypnotically refreshed defendant in a criminal case to testify on her own defense. Rock asserts that she has a Fourteenth Amendment due process right to testify in her own defense that should override Arkansas' evidentiary rule. Rock unquestionably has a general due process right to testify in her own defense at trial that the state cannot completely restrict. *Nix* v. *Whiteside*, 475 U.S. ___, 106 S.Ct. 988, 993, 1004-05 n.5, 89 L.Ed.2d 123, 133, 147 n.5 (1986); it is just as certain that Rock cannot testify in her own defense in whatever manner she pleases. *Nix, supra*, 106 S.Ct. at 998, 89 L.Ed.2d at 138 and *Harris* v. *New York*, 401 U.S. 222, 225 (1971). This Court must decide, as it must so often, whether the rights of society or the rights of an individual crimin defendant shall prevail. Respondent Arkansas respectf

submits that this Court should resolve this issue by applying the analysis this Court employed in *Chambers* v. *Mississippi*, 410 U.S. 284 (1973).

A Mississippi jury convicted Leon Chambers of murdering a police officer. After the Mississippi Supreme Court affirmed Chambers' conviction, this Court granted Chambers' petition for a writ of certiorari. In its decision, this Court invalidated, on due process grounds, two state rules of evidence. The first unconstitutional rule was Mississippi's voucher rule that prohibited Chambers from cross-examining his own witness. Mississippi also did not allow statements made against penal interest as an exception to its hearsay rule. This non-exception to the hearsay rule kept Chambers from introducing exculpatory testimony from three witnesses who would have repeated in court, the out-of-court confession of one Gable McDonald to the murder of the police officer. This Court held that the voucher rule denied Chambers his due process right to confront witnesses by cross-examination and that the inclusion of statements against penal interest within the hearsay rule denied Chambers his due process right to present testimony in his own defense.

This Court reached its decision by holding that a criminal defendant's due process rights were not absolute and must, when necessary, bow to accommodate the state's legitimate interests in the criminal trial process. *Chambers, supra,* at 295. Furthermore, this Court noted that the competing interests of the defendant and the state must be closely examined if the denial of the defendant's rights would undermine the "integrity of the fact finding process." *Chambers, supra,* at 295.

In the instant case, Rock does not argue that her hypnotically enhanced testimony was reliable. The facts of the case show that Rock knew why she was to be hypnotized and that she knew it would be to her advantage to recall the events

in question favorably. Expert opinion states that hypnotically refreshed testimony is not reliable, particularly when procedural safeguards are not strictly followed, as they were not followed in the instant case. In *Chambers*, this Court stressed that the excluded hearsay evidence was very reliable and gave great weight to "reliability" in striking the balance in favor of Chambers' right to present the hearsay evidence. *See Chambers, supra*, at 299-300. In several other cases this Court has attached great weight to the reliability of evidence in determining the extent of constitutional rights of criminal defendants. *See United States* v. *Inadi*, 475 U.S. ___, 106 S.Ct. 1121, 1126-27, 89 L.Ed. 2d 390, 398-9 (1986) (nontestifying co-conspirator need not be unavailable as a condition for admission of his out-of-court statements); *Mancusi* v. *Stubbs*, 408 U.S. 204, 213-14 (1972) (indicia of reliability must be present before hearsay testimony of an unavailable witness is admissible); and *Dutton* v. *Evans*, 400 U.S. 74, 88-9 (1970) (same).

In *Chambers* this Court considered not only the reliability of the hearsay evidence at issue, but also the interest of Mississippi in refusing to except statements against penal interest from its hearsay rule. Given the facts of *Chambers*, this Court held that Mississippi's interest in seeing that out-of-court statements against penal interest did not come into evidence was minimal. Arkansas' interest in the instant case is substantial. Arkansas' interest lies in its ability to establish rules of evidence that protect the truth-finding function of the jury and, thereby, enable the jury to make decisions rationally. *Cf. Washington* v. *Texas*, 388 U.S. 14, 22-3 (1967) (Texas' rule of witness incompetency for co-defendants found violative of due process because of their irrational distinctions with respect to classes of witnesses likely to commit perjury). Arkansas must have the right to insure that juries reach verdicts in criminal cases on the basis of logical inference, not guesswork.

Arkansas cannot protect this interest, given the facts of this case, in any way except by exclusion of Rock's testimony based on her hypnotically enhanced memory. At trial, Arkansas had no other witnesses to the crime to present to the jury. Arkansas could not have cross-examined Rock at trial on her pre-hypnosis memory of the few moments in which she shot her husband to death because she had no such memory (J.A. 62-4). In any case, because Rock had already been hypnotized *before* trial, at trial her then present recollection of her pre-hypnosis memory was tainted by hypnosis such that the jury would not have been able to tell what part of Rock's testimony was the product of her actual, pre-hypnosis memory and what part was the product of hypnotic enhancement. *See State ex rel. Collins, supra,* 132 Ariz. at 201, 644 P.2d at 1292 and *Shirley, supra,* 181 Cal. Rptr. 271-72, 641 P.2d at 803. Arkansas could not even ask the trial court for a special instruction regarding the weight of Rock's hypnotically refreshed testimony because the trial court cannot, as a matter of the Arkansas Constitution, comment on the weight that the jury should accord testimony. See *Weatherford* v. *State,* 286 Ark. 376, 380-81, 692 S.W.2d 605, 607 (1985) and *Skaggs* v. *State,* 234 Ark. 510, 353 S.W.2d 3 (1962). If such a judicial comment on the weight of Rock's testimony were possible in Arkansas, it would take the incongruous form of the trial court telling the jury that the more confident of the truth of her testimony that Rock seems to be, the more likely it is that her testimony is unreliable — at the very least the trial court would have to instruct the jury that it could not rely on its normal, common sense notion of credibility in evaluating Rock's testimony. Such an instruction could not protect Arkansas' interest in having the jury reach a decision based on reasoned judgment rather than speculation. *Cf. Bruton* v. *United States,* 391 U.S. 123, 135 (1968) (in some contexts, jurors cannot be expected to follow jury instructions).

In summary, due process of law does not give a criminal defendant a license to throw any and everything before a jury. In balancing the defendant's interest in presenting evidence and the state's interest in preserving the jury's truth-finding power and its concomitant ability to render rational decisions, this Court should consider the reliability of the defendant's proffered evidence. If the defendant's evidence is so lacking in the potential to be true that the jury must guess if it is is true, then the due process clause does not require the admission of such evidence. Testimony that is the product of a hypnotically enhanced memory is inherently unreliable and a hypnotically refreshed witness projects such certainty in the truth of his or her testimony that jurors cannot rely on their normal, common sense ability to tell truth from falsehood. Unlike the testimony of a witness who lies, a hypnotically refreshed witness' testimony can become a seamless web of falsehood that the state cannot unravel by cross-examination or by contradictory testimony. Given that, a jury has no logical or common sense way to tell if a hypnotically refreshed witness is telling the truth, hypnotically refreshed testimony threatens the jury's ability to find the truth and to return verdicts based on reason. Because Arkansas' interest in rational jury verdicts ought to outweigh Rock's due process right to introduce inherently unreliable testimony, this Court should affirm the Arkansas Supreme Court's decision.

D. *If the trial court's restriction of Rock's testimony was error, then the error was harmless.*

On review by certiorari of affirmances by state appellate courts in criminal cases, this Court will not determine anew the existence of historical facts. *See Watts* v. *Indiana*, 338 U.S. 49, 50-1 (1949). However, where inferences drawn from historical facts bear on the infringement *vel non* by the state of a defendant's constitutional rights, then this Court will analyze the facts of the case, such as they are, to see if the

defendant's constitutional rights were denied. *Drope* v. *Missouri*, 420 U.S. 162, 174-75 (1975); *Watts* v. *Indiana, supra;* and *Norris* v. *Alabama*, 294 U.S. 587, 590 (1935).

Given the facts of the instant case, respondent Arkansas submits that if Rock's due process right to testify in her own defense was infringed, then the error was harmless. Rock did, in fact, testify. The trial court applied its order restricting Rock's tesitmony in a very lenient way that gave Rock great latitude before the jury. Rock was able to tell the jury that the dispute with her husband began when they were at home and when he refused to let her have some pizza and refused to let her leave the room. (J.A. 98; J.A. 104) Rock was able to tell the jury that her husband pushed her against the wall and hit her. (J.A. 99; J.A. 101-02) Rock was able to tell the jury that her husband's behavior on the night in question was unusual. (J.A. 102) Rock was able to tell the jury that her husband's death was an accident, that she did not intentionally shoot her husband and that she never pointed the gun at him. (J.A. 105; J.A. 107) Rock was able to tell the jury that she had never before shot the pistol that she used to shoot her husband. (J.A. 101) The jury was told repeatedly in the State's case that Rock had told police officers who had questioned her just after the incident that her husband had choked and beaten her and that the shooting was an accident. (T. 281; T. 301-4; T. 337-38; J.A. 3-10; T. 381; T. 388)

Given the great detail of her testimony and the testimony of her expert witness, who established that the pistol at issue could have discharged accidentally (T. 662-63; T. 671-78), Rock was able to place her version of her husband's death before the jury in sufficient detail for the jury to know her version — an accidental death in a struggle over a pistol — and to compare her version of the incident to the State's evidence. That the jury resolved the matter of credibility against Rock is not attributable to her inability to place her story before the

jury. This Court may hold that a state's infringement of a criminal defendant's constitutional rights was harmless error. *Chapman* v. *California*, 386 U.S. 18, 22 (1967); *see also Delaware* v. *Van Arsdall*, 475 U.S. ___, 106 S.Ct. 1431, 1435-8, 89 L.Ed. 674, 683-87 (1986). Respondent Arkansas submits that if the trial court's restriction of Rock's due process right to testify was error, given the detail of the testimony she was allowed to present and the testimony from her expert, then the error was harmless.

II.

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW IN THAT THE PRETRIAL ORDER OF THE COURT WAS NOT AN UNCONSTITUTIONAL LIMITATION ON PETITIONER'S RIGHT TO EFFECTIVE COUNSEL AND THE PREPARATION OF HER DEFENSE.

For her second allegation of error petitioner Rock argues that the Arkansas Supreme Court decision at issue violates her Sixth and Fourteenth Amendment due process right to the effective assistance of counsel. Specifically, Rock argues that the Arkansas Supreme Court's decision interferes with her due process right to have meaningful consultations with her attorney in order to prepare her defense. Rock cannot pursue this issue on review by certiorari before this Court because she did not follow proper appellate procedure before the Arkansas Supreme Court and, in any case, the issue is moot.

Respondent Arkansas notes that the Arkansas Supreme Court did not decide this issue. With respect to the "hypnotic-refreshment-of-testimony" issue, the Arkansas Supreme Court addressed itself to the admissibility of hypnotically refreshed testimony, the trial court's application of its pretrial order excluding Rock's hypnotically refreshed testimony and Rock's Sixth and Fourteenth Amendment due process right to testify in her own defense. The Arkansas Supreme Court did not address any "right-to-consult" issue because Rock did not raise this issue in her brief to the Arkansas Supreme Court, although she did touch on such a right in a pretrial brief to the trial court. (T. 33) In Arkansas, as a matter of appellate practice, issues not argued on appeal are considered waived. *Shockley* v. *State*, 282 Ark. 281, 668 S.W.2d 22 (1984) and *Smith* v. *State*, 264 Ark. 329, 333, 571 S.W.2d 591, 593 (1978). Because Rock failed to follow Arkansas' appellate procedure, she cannot pursue

this issue before this Court on review by writ of certiorari. *Beck* v. *Washington*, 369 U.S. 541, 549-54 (1962); *Wolfe* v. *North Carolina*, 364 U.S. 177, 195 (1960); and *John* v. *Paullin*, 231 U.S. 583, 585 (1913). Rock cannot argue that the trial court or the Arkansas Supreme Court must necessarily have decided the "right-to-consult" issue when they decided that her hypnotically refreshed testimony was inadmissible; whether a defendant's testimony is admissible at trial is not the same issue as whether the defendant had an adequate opportunity to consult with counsel in order to prepare a defense before trial. *See Cornell* v. *Superior Court*, 52 Cal. 2d 99, 338 P.2d 447 (1959).

Furthermore, respondent Arkansas notes that this issue is moot. Because Rock never bothered to give notice to the trial court of her intention to have herself hypnotized, she was free to do so and afterwards to consult with her attorney in any way she saw fit. Rock *was* hypnotized before trial. As a result of the hypnosis, Rock was able to provide information to her attorney that was useful in preparation of her defense. The Arkansas Supreme Court's decision in no way impeded Rock's ability to consult with her attorney *before* trial — the Arkansas Supreme Court's decision could not have interfered with Rock's right to effective assistance of counsel because the Arkansas Supreme Court handed down its decision over two years after the fact of Rock's pretrial hypnosis. This Court does not render opinions on moot issues. *See University of Texas* v. *Camenisch*, 451 U.S. 390 (1981); *North Carolina* v. *Rice*, 404 U.S. 244 (1971); and *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-41 (1937). Because Rock is presently aware of the information that was the product of her hypnotic refreshment and because Rock is presently able to use this information in consultation with her attorney to prepare a defense against any future retrial for the instant offense, any interference with Rock's right to effective assistance of counsel caused by the Arkansas Supreme Court's decision is not capable of repe-

tition. *Cf. Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (denial of pretrial bail mooted by appellee's conviction) and *Roe* v. *Wade*, 410 U.S. 113, 125 (1973) (abortion litigation not mooted by end of pregnancy).

Moreover, in her argument under this heading Rock has not set forth one specific allegation of prejudice; she has not shown how the Arkansas Supreme Court's decision impaired her ability to consult with counsel before trial such that her defense was prejudiced at trial. Rock's right to testify was curtailed, but this restriction had nothing to do with her right to effective assistance of counsel. Because this Court does not reverse on the basis of harmless error, *a fortiori*, it should not reverse where the petitioner has failed to even make an allegation of prejudice. *See Rushen* v. *Spain*, 464 U.S. 114, 120 (1983) (harmless error) and *Frazier* v. *Cupp*, 394 U.S. 731, 735-36 (1969) (harmless error).

III.

THE LIMITATION OF PETITIONER'S TESTIMONY TO PRE-HYPNOTIC STATEMENTS MADE TO THE HYPNOTIST WAS NOT ARBITRARY AND UNREASONABLE TO THE EXTENT THAT IT VIOLATED DUE PROCESS OF LAW.

For her third allegation of error petitioner Rock argues that the Arkansas Supreme Court erred in affirming the trial court's decision to exclude from the evidence before the jury a police officer's probable cause statement. Rock offered the statement as defendant's exhibit number seven. (J.A. 105) The statement contained prior, out-of-court statements made by Rock to a police officer just after she had been arrested. (J.A. 106-07) On appeal to the Arkansas Supreme Court Rock argued that her prior statement to the police officer was admissible as non-hearsay pursuant to Ark. Unif. R. Evid. 801(d)(1)(ii) to rebut an implied charge of recent fabrication. (Rock's Arkansas Supreme Court brief at Vol. IV, 149-50) Rock did not explicitly put to the trial court or to the Arkansas Supreme Court an "arbitrary classification" argument as a basis for the admissibility of her prior out-of-court statements contained in the probable cause statement. She raises this argument in favor of the admissibility of her prior statements in the probable cause statement for the first time before this Court. Because Rock did not raise this point at the trial court level, she failed to comply with Arkansas' contemporaneous objection rule. *See Fretwell* v. *State*, 289 Ark. 91, 98, 708 S.W.2d 630, 634 (1986) and *Wicks* v. *State*, 270 Ark. 781, 785-87, 606 S.W.2d 366, 369-70 (1980). Because Rock did not comply with Arkansas' contemporaneous objection rule, as a matter of Arkansas appellate procedure she could not have raised this issue on appeal to the Arkansas Supreme Court. *Fretwell, supra.* If a petitioner completely fails to make a proper objection in state court to an alleged violation of one of his

rights guaranteed by the United States Constitution, this Court will not consider an argument addressing the alleged deprivation when raised for the first time before this Court on review by writ of certiorari. *Moore* v. *Illinois*, 408 U.S. 786, 799 (1972); *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969); and *Street* v. *New York*, 394 U.S. 576, 582 (1969). Arkansas' interest in requiring contemporaneous objections at trial is a legitimate state interest and is not simply an illegitimate means to deny criminal defendants the opportunity to vindicate their constitutional rights. *See Wainwright* v. *Sykes*, 433 U.S. 72, 88-90 (1977) and *Henry* v. *Mississippi*, 379 U.S. 443, 448-49 (1965).

In any case, the record reveals that Rock was not limited to her hypnotist's intake notes with respect to establishing her pre-hypnosis recollection. The trial court permitted Rock to tell the jury, in great detail, aspects of her past and of her marriage to her late husband. (T. 809-40) This testimony by Rock was not a part of her hypnotist's intake notes. Furthermore, Rock's out-of-court statements that her husband had choked and beaten her that were reported in the probable cause statement (J.A. 106-07) were introduced into evidence as part of the State's case-in-chief in Police Officer Strickland's report of his questioning of Rock at the police department. (T. 275-77; J.A. 3-10; T. 381; T. 388) This testimony recounted Rock's pre-hypnosis statement to the police that her husband's death was an accident. In addition, even though the probable cause statement was not admitted, the trial court permitted a police officer to read Rock's out-of-court statements contained in the probable cause statement to the jury as part of Rock's case. (T. 802) Just to make sure, Rock's trial counsel also read the pertinent part of Rock's out-of-court statement contained in the probable cause statement to the jury while cross-examining a police officer. (T. 805) The exclusion of evidence cannot be considered prejudicial if the same evidence was introduced by another witness and was before the jury for its consideration.

Drumm-Flato Commission Co. v. *Edmisson*, 208 U.S. 534, 538 (1908).

Respondent Arkansas submits further that with respect to the events that occurred on the day Rock shot her husband and, specifically, with respect to what happened when he was shot, Rock was able to tell her story to the jury in such detail that her due process right to testify in her own defense was not unduly restricted. See Section I(D) of respondent Arkansas' brief on the merits, *supra*. The ability of Rock to put this testimony before the jury proves that the trial court's order restricting Rock's testimony to those things she related to her hypnotist in a pre-hypnosis interview was not enforced in an illogical, arbitrary or overly strict way. *Cf. Washington* v. *Texas*, 388 U.S. 14, 22-3 (1967). The trial court tried to keep out only that part of Rock's testimony that could have been tainted by hypnotic refreshment. The record shows that the trial court was well aware that Rock would be entitled to "reasonable latitude" (J.A. 36) in describing the events leading up to the moment in which she shot her husband. As the Arkansas Supreme Court noted, the trial court applied its order restricting Rock's testimony in an extremely lenient, generous way that allowed Rock to tell her story to the jury witout including unreliable, hypnotically refreshed testimony. (Rock's certiorari petition at xi).

IV.

THE APPLICATION OF THE PRETRIAL ORDER AT THE TRIAL DID NOT DENY PETITIONER DUE PROCESS OF LAW.

For her fourth allegation of error petitioner Rock seems to argue that her due process right to a fair trial was violated by the State's numerous objections during her direct examination and by the trial court's repeated efforts to clarify the scope of its restriction on her testimony. Neither of these objections was specifically raised at trial or argued on appeal. The Arkansas Supreme Court, perforce, did not decide either issue. Far from complaining of the trial court's efforts to clarify the scope of its ruling, Rock's trial counsel said that he understood the trial court's explanations. (J.A. 15-7; 24) Because Rock did not present these arguments to the state trial court below, she failed to comply with Arkansas' contemporaneous objection requirement. *See Fretwell* v. *State*, 289 Ark. 91, 98, 708 S.W.2d 630, 634 (1986). Because Rock did not comply with Arkansas' contemporaneous objection requirement, she cannot pursue these issues before this Court on review by writ of certiorari. *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969); *see also Wainwright* v. *Sykes*, 433 U.S. 72, 88-90 (1977).

CONCLUSION

Respondent, the State of Arkansas, respectfully requests that this Honorable Court deny petitioner Rock's petition for a writ of certiorari to the Arkansas Supreme Court, that this Honorable Court deny her any relief whatsoever and that this Honorable Court affirm the decision of the Arkansas Supreme Court reported in *Rock* v. *State*, 288 Ark. 566, 708 S.W.2d 78 (1986). In so affirming *Rock, supra*, respondent Arkansas respectfully requests that this Court hold that a criminal defendant does not have a due process right to testify after hypnotic refreshment of his or her memory. Alternatively, respondent Arkansas requests that this Court affirm *Rock, supra*, by holding that due process of law requires certain procedural safeguards be strictly followed when potential witnesses in criminal trials have their memories hypnotically refreshed before trial and that the safeguards were not properly followed in the instant case. Alternatively, respondent Arkansas respectfully requests that this Court affirm *Rock, supra*, on the basis of the harmless error doctrine.

Respectfully submitted,

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No. 86-130

In The

Supreme Court of the United States

October Term, 1986

VICKIE LORENE ROCK,

Petitioner,

vs.

STATE OF ARKANSAS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. REFUSAL TO ALLOW PETITIONER'S TESTIMONY WAS NOT HARMLESS ERROR

Respondent has argued that the trial court's restriction on the testimony of petitioner was harmless error. One has only to read the transcript of petitioner's testimony omitting the portions which were out of the hearing of the jury to understand that the error could in no way be considered harmless. The testimony was effectively reduced to a series of simplistic responses to questions paraphrased from the neuropsychologist's notes (JA 19, JA 96, 97-JA 105).

Much of what the State argues (and the Arkansas Supreme Court held the jury was able to hear about the event) was in fact statements by other persons about the event. For example, on page 15 of its brief, the State of Arkansas argues that petitioner "was able to 'remember' that she cocked the pistol." That is a misstatement of the testimony. A careful reading of the series of questions asked to Dr. Back preceding the referenced citation by the State to Joint Appendix 95 indicates that Dr. Back was simply saying yes, she remembered having asked the question whether the hammer was cocked, and no testimony whatever as to what petitioner's response was is included in the record.

Petitioner was unable to testify where she was standing when the gun went off (JA 103), that she had reached for the door and tried to leave but Frank "jumped in front of her" (JA 104), that Frank Rock had grabbed the gun and it discharged (JA 104), that petitioner had pointed the gun at the floor after she picked it up (JA 29), that

petitioner pleaded with her husband not to hit her again (JA 29), and that petitioner immediately called for help for her husband after the gun discharged (JA 29). Had the jury been able to hear and had they believed any substantial part of the testimony they could have concluded that the discharge of the firearm was completely accidental.

II. PETITIONER'S ARGUMENT THAT THE PRETRIAL ORDER OF THE COURT WAS AN UNCONSTITUTIONAL LIMITATION ON PETITIONER'S RIGHT TO EFFECTIVE COUNSEL IS NOT A MOOT ARGUMENT AND WAS PREVIOUSLY RAISED.

Respondent has argued that petitioner did not raise the argument of impairment of right to effective counsel before the Arkansas Supreme Court, and that in any event, the issue is moot.

The first time the right to counsel argument was made appears in petitioner's written brief to the trial court citing *Cornell v. Superior Court*, 52 Cal. 2d 99, 338 P. 2d 447 (1959). (TR 33) The trial court clearly intended that there was an interruption in the relationship because on October 1, 1984, the trial court enjoined petitioner and her counsel from making any further use of hypnosis. (TR 59) That injunction was never lifted and so the issue is not moot.

Petitioner concedes that there is a substantial question as to whether the issue was raised or argued clearly on appeal to the Arkansas Supreme Court, but even if it was not, the Arkansas Supreme Court raised the issue again by going far beyond simply upholding the trial court in its order and in using the decision to adopt for the State of Arkansas the per se exclusionary rule where the witness

has been hypnotized. While a simple affirmance of the trial court's order in this case would have been dispositive of the issues, the Arkansas Supreme Court elected to go substantially further than the trial court and by so doing has certainly raised a constitutional issue as argued by petitioner.

III. PETITIONER IS NOT BARRED BY THE CONTEMPORANEOUS OBJECTION RULE FROM ARGUING THAT THE PRETRIAL COURT ORDER OF THE COURT WAS ARBITRARY AND UNREASONABLE IN NOT ALLOWING REFERENCE TO OTHER PREHYPNOSIS STATEMENTS.

Respondent has argued that petitioner did not comply with Arkansas's "contemporaneous objection rule" and is thereby not free to argue the arbitrariness of the order or of the refusal to admit other admittedly prehypnotic statements.

The proffer of the prehypnosis statements clearly was made for the purpose of showing additional prehypnosis memory on the part of petitioner. Both counsel for petitioner in its brief and the Arkansas Supreme Court in its opinion understood the purpose of the proffer but got sidetracked on a discussion of Rule 801 (d), Arkansas Uniform Rules of Evidence. Petitioner offered the exhibit. The State objected to the exhibit on the grounds that "its hearsay, irrelevant and everything else, Your Honor." (JA 105) The objection was sustained. The burden is on the objecting party to make known his specific ground for objection and the court was free to add any other further statement characterizing the evidence and the ruling thereon. Rule 103, Arkansas Uniform Rules of Evidence.

Because the transcript of the pretrial hearing is not included in the record it is impossible to determine on what basis the trial judge thought that the intake notes of the neuropsychologist were the "best evidence" of petitioner's prehypnosis memory. (JA 17) However from the context it is clear that the judge was not making a mistaken reference to the best evidence rule. The Arkansas Supreme Court noted that "once it has been shown by clear and convincing evidence that testimony of prehypnotic recollections is reliable, a subject may testify, but only to those memories *demonstrably* shown to be the product of the memory prior to the hypnosis. The burden of proving the reliability is on the preponent of the testimony." (emphasis added) (Appendix to Petition, p. x) Certainly there can be no more reliable statement in the context of it being a prehypnotic memory than a statement given to law enforcement officials months prior to the hypnosis. The Arkansas Supreme Court seems to say that it has to be proved what was remembered before the hypnosis but that prehypnosis statements made to law enforcement officials or presumably anyone else other than the hypnotist cannot be used to do it. That is unconstitutionally arbitrary and unreasonable. The issue was argued at the Arkansas Supreme Court at Pages 144 and 145 of petitioner's brief and at Page 4 of petitioner's reply brief.

IV. PETITIONER IS NOT BARRED FROM HER ARGUMENT THAT THE APPLICATION OF THE PRETRIAL ORDER AT THE TRIAL DENIED PETITIONER DUE PROCESS OF LAW BECAUSE OF THE ARKANSAS CONTEMPORANEOUS OBJECTION REQUIREMENT.

Respondent misconstrued petitioner's final argument that the pretrial order was improperly applied during the

course of the trial to an argument that the prosecution's numerous objections violated petitioner's right to testify. Respondent argues that such objection was not made at trial or argued on appeal. That issue stated by respondent is not the issue raised or argued by petitioner.

The process of increasingly restrictive rulings from the bench was objected to repeatedly at trial. JA 15, JA 19, JA 20, JA 21, JA 38, JA 39, JA 103, JA 104, JA 105) The argument was made in petitioner's brief to the Arkansas Supreme Court Pages 144 and 145 and was dealt with by the Arkansas Supreme Court. Specifically the Court stated "We turn to appellant's argument that the trial court's limitations on her testimony were too restrictive." (Appendix to Petition, p. ix) The Court further stated "Appellant argues the court misapplied the rule employed by courts where hypnotically induced testimony is inadmissible and was too restrictive." (Appendix to Petition, p. x)

Most importantly, however broad petitioner's constitutional argument may have been at the Arkansas Supreme Court, the Arkansas Supreme Court's decision with respect to the constitutional issues was equally broad. The Arkansas Supreme Court chose to discuss the constitutional rights only in general without specifying whether they were dealing with the defendant's right under Article 2, Section 10 of the Constitution of the State of Arkansas or the Fourteenth Amendment to the Constitution of the United States. The Court clearly contemplated the issue of the difference between the constitutionality of the order itself and the constitutionality of the subsequent application of the order at the trial when it made the following statement in its opinion:

> "The trial court was faced with a difficult situation at best when presented with a witness who had been hypnotized and the damage done before any ruling could be made. We think the trial court took the proper course in its ruling and any prejudice or deprivation caused the appellant in this case was minimal and resulted from her own actions and not by any erroneous ruling of the court. We can find no violation of her constitutional rights." (Appendix to Petition, p. xiv)

Whether petitioner argued the issue well at the Arkansas Supreme Court or not, the Court obviously understood the argument and ruled on it. Where the state has ruled on the issue the issue is reviewable by certiorari before this Court. *Franks v. Delaware,* 438 U.S. 154, 57 L. Ed. 2d 667 (1978); *Ulster County Court v. Allen,* 442 U.S. 140 (1979).

CONCLUSION

The judgment of the Supreme Court of Arkansas should be reversed and a new trial granted for Petitioner.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

VICKIE LORENE ROCK,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Arkansas

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE PRODUCT LIABILITY ADVISORY COUNCIL AND MOTOR VEHICLE MANUFACTURERS ASSOCIATION IN SUPPORT OF RESPONDENT STATE OF ARKANSAS

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE PRODUCT LIABILITY ADVISORY COUNCIL AND MOTOR VEHICLE MANUFACTURERS ASSOCIATION IN SUPPORT OF RESPONDENT STATE OF ARKANSAS

The Product Liability Advisory Council ("PLAC") and the Motor Vehicle Manufacturers Association ("MVMA") move for leave to file the attached *amicus curiae* brief in support of the respondent State of Arkansas. The respondent has consented to the filing of the brief; a copy of its written consent is filed with the Court. The consent of the petitioner was requested but refused. This motion is filed, therefore, in accordance with Supreme Court Rule 36.3.

The nature of PLAC's and MVMA's interest in this case, the factual and legal issues presented in their brief, and the relevance of those issues to the case are identified in Part I of the brief, entitled Introduction and Summary, which is incorporated herein.

PLAC and MVMA request that this motion be granted.

Respectfully submitted,

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February 11, 1987

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BRIEF OF AMICI CURIAE PRODUCT LIABILITY ADVISORY COUNCIL AND MOTOR VEHICLE MANUFACTURERS ASSOCIATION IN SUPPORT OF RESPONDENT STATE OF ARKANSAS

I. INTRODUCTION AND SUMMARY

The Product Liability Advisory Council ("PLAC") and the Motor Vehicle Manufacturers Association ("MVMA") submit[1] this *amicus curiae* brief. PLAC is a non-profit membership corporation[2] whose principal

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[1] A motion to file this brief is attached.

[2] PLAC members are American Honda Motor Co., Inc., American Telephone & Telegraph, Automobile Importers of America, Inc., Bell Helicopters Textron Inc., Black & Decker Co., the Budd Co., Clark Equipment Co., FMC Corp., Fiat Auto U.S.A. and Ferrari,

purpose is to submit briefs, as friend of the court, in appellate cases involving significant issues affecting the law of products liability. MVMA is a trade organization [3] whose member companies build over ninety-nine percent of all motor vehicles produced in the United States.

The specific issue in this case is whether Arkansas' exclusion of a criminal defendant's hypnotically induced testimony violated that criminal defendant's Constitutional right to testify in his own behalf. MVMA and PLAC do not have experience or expertise in the criminal law, and therefore take no position on that specific issue. However, Petitioner's brief appears to go beyond that issue, for it suggests that hypnotically induced testimony ought to be admissible, in general, in any case; cross-examination, it says, "is a better means of dealing with invention of testimony under the guise of refreshing recollection than prohibiting the testimony." (Petitioner's Brief, p. 13)

MVMA and PLAC oppose admission of hypnotically induced testimony in general, and in particular in the civil cases in which we are experienced. It is not reliable, and the overwhelming consensus of expert opinion holds that it is not. Trials are meant to find the truth. Hypnotically induced testimony subverts the search for truth and, we believe, undermines the integrity of the trial system.

N.A., The Firestone Tire & Rubber Company, Fruehauf Co., Great Dane Trailers, Inc., International Playtex, Motor Vehicle Manufacturers Association of the United States, Inc., Nissan Motor Corp., Otis Elevator Co., Porsche Cars North America, Inc., Sturm, Ruger & Co., Subaru of America, Inc., and Toyota Motor Sales, U.S.A., Inc.

[3] MVMA members are American Motors Corp., Chrysler Corp., Ford Motor Co., General Motors Corp., Honda of America Mfg., Inc., LTV Aerospace & Defense Co., AM General Division, M.A.N. Truck & Bus. Corp., Navistar International Corp., PACCAR Inc., Volkswagen of America, Inc., and Volvo North America Corp.

This is not a view held in the abstract. We have seen hypnotically induced testimony at work, and the problems with it are very earthy and very real. We believe it may be helpful to share with the Court one example, which, we believe, shows how hypnosis actually does its job, and what it can do to a lawsuit. Then, citing to that example, we discuss the dangers of hypnosis when used to restore memory, review the law dealing with hypnotically induced testimony,[4] and comment briefly on the *Rock* case so far as it concerns the admission of hypnotically induced testimony in general.

II. A CASE IN POINT

Sprynczynatyk v. General Motors, 771 F.2d 1112 (8th Cir. 1985), *cert. den.* 106 S.Ct. 1263 (1986) (No. 85-1045) is a case in point. The case received some national attention, and was the subject of a session of "60 Minutes" (although not with regard to the hypnosis issue). This is what happened:

The Accident

A fourteen year old boy drove a 1980 General Motors Chevrolet Citation down a steep, washboard gravel road near Bismarck, North Dakota. The car picked up speed. The boy jerked the car back and forth across the gravel, panicked, and lost control. The car went off the road. His mother, who was with him, was very badly hurt. She and her husband sued General Motors.

After the accident the boy said and swore three times he had not touched the brakes.[5] But plaintiffs' product liability theory called for the boy to have hit the brakes. The boy was then sent to Texas to be hypnotized. The

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[4] Most of which is not dealt with in Petitioner's brief.

[5] For example, twelve days after the accident the boy swore "I didn't apply the brakes at all. I just took my foot off the gas and it started going over." The boy was deposed before hypnosis, and said again that that was his best recollection. See 771 F.2d at 1115.

hypnotist did business with plaintiffs' counsel, and knew what counsel was interested in.

The Hypnosis Session

When the hypnosis session began, the hypnotist put a ring on a coffee table, and told the boy to focus on it and be filled by it. "Let yourself go," the hypnotist said. Then he said you are going down some stairs, and the door to your unconscious is at the bottom of them. The boy replied that the door had a silver handle. The hypnotist said open it. The boy raised his hand, and opened it.

The hypnotist assured the boy that "the mind can reach back and recollect things that you never thought were possible," and "we only have to reach back and recall it . . . . I'm going to let you show me how well you can do that now." Go back to the day of the accident "in a time machine," he went on.

The hypnotist took the boy through the accident day and the evening, and then up the gravel hill, and down it. The hypnotist praised the boy, and said he and his family were proud of him, as they went along. When they started down the hill, the hypnotist asked the boy where his feet were. The hypnotist kept asking: Where is your left foot, where is your right foot, where are your feet? Thirty-two times he asked that, and (although he did not mean to) his voice rose some as he did. The boy did not answer that he had hit the brakes until, finally, this happened:

> "RODNEY: Uh-huh. And I see that I'm going to go in the [left] ditch and hit the fence.
>
> "HYPNOTIST: You see you are going to hit it. What are you going to do? Where is your right foot?
>
> "RODNEY: On the brake.
>
> "HYPNOTIST: What are you doing with your right foot and how much pressure are you putting on the brakes?

"RODNEY: Pushing.

"HYPNOTIST: How hard?

"RODNEY: Hard.

"HYPNOTIST: As hard as you can?

"RODNEY: Uh-huh."

See 771 F.2d at 1115.

Plaintiffs' attorney was watching outside the room through a one-way mirror. Shortly after that exchange, the hypnotist left the boy, and went out to talk with plaintiffs' attorney. The hypnotist came back, asked a few more questions, and said he was "very, very pleased." Then he told the boy to walk back through the door with the silver handle and up the stairs. He said you will be in a "beautiful place" when you get to the top, "where you love everybody and everybody loves you," and "you feel terrific."

The boy and the hypnotist smiled and shook hands, and the session ended. The boy felt greatly relieved after hypnosis, as if a burden had been lifted from his shoulders. This was all recorded on video tape.

The Trial and Appeal

The boy's hypnotically induced memory replaced his pre-hypnosis memory, and, over objection, the boy testified to his hypnotically induced testimony at trial. His testimony established the first premise of plaintiffs' liability theory, that the boy had hit the brakes. The jury returned a verdict for plaintiff. 771 F.2d at 1116. The Eighth Circuit reversed, finding that the trial court had erroneously admitted a videotape of the hypnosis session to establish the truth of what the boy said during the session. The Eighth Circuit instructed the trial court on remand not to admit the hypnotically induced testimony if, after hearing, the Court found it "tainted." 771 F.2d at 1123. This Court denied certiorari. 106 S.Ct. 1263 (1986) (No. 85-1045). The case is no longer pending.

III. THE DANGERS OF HYPNOSIS

The decision of the Supreme Court of Arkansas in this case is based in part on the writings of Drs. Bernard Diamond and Martin Orne, 708 S.W.2d at 80-81; Dr. Diamond filed an affidavit and Dr. Orne testified in the *Sprynczynatyk* case. They are the "most persuasive spokesmen for the relevant scientific community," and the "majority are in full agreement with [their] essential findings and conclusions." See *People v. Shirley*, 31 Cal. 3d 18, 63, 641 P.2d 775 (1982), *cert. den.*, 458 U.S. 1125 (1982).

Dr. Diamond is a professor of psychiatry and law at the University of California, and "the author of numerous articles in the area of psychiatry and the law." Dr. Orne has been president of the International Society of Hypnosis, director of "one of the nation's most active laboratories of hypnosis research," the editor of the International Journal of Clinical and Experimental Hypnosis, a "senior author of the article on hypnosis in the Encyclopaedia Britannica," and the "author of leading articles on hypnosis research in the scholarly journals." His "eminence" has "repeatedly been recognized" in the case law. See *People v. Shirley*, 31 Cal. 3d 18, 63, 641 P.2d 775 (1982).

As the Arkansas Supreme Court noted, "hypnosis may have gained recognition [from experts] as an aid to therapy," 708 S.W.2d at 80; it may serve its therapeutic goal regardless whether what the patient "relives" is fact or fantasy.[6] But hypnosis meant to refresh or re-

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[6] Hypnosis may also be a useful investigative tool, recognizing that each item is merely a lead and nothing else. A lead is not testimony. It can simply be followed, and may turn something up—or prove an embarrassment. (Orne, "The Use and Misuse of Hypnosis in Court," in Critical Issues in American Psychiatry and the Law, Vol. 2 (Richard Rosner, ed.) 1985, pp. 219, 227.) But see Diamond, "Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness," 68 Calif. L. Rev. 313, 332 (1980): "[T]he value of hypnosis for investigative purposes has been greatly over-

form one's memory so he may testify to it is something else; there it matters whether what the patient relives—and testifies to—is fact or fantasy.

As the Arkansas court also noted, hypnosis "has not gained general acceptance as a means of ascertaining truth in the field of forensic law", *ibid.*, because hypnosis as truth finder is unreliable. The experts, and in particular Drs. Orne and Diamond, have explained why. These are the main reasons; the *Rock* court cited to each of them.

Suggestion. One under hypnosis suspends critical judgment, and wants very much to please the hypnotist. Consequently, he is "extremely suggestible." *Rock*, 708 S.W. 2d at 80 (quoting Diamond). That is the hallmark of hypnosis. Suggestions may be implicit, and come from tone of voice. When made they "contaminate" the patient's memory, because they change it. (*Ibid.*; Orne, et al., "Hypnotically Induced Testimony," in *Eyewitness Testimony: Psychological Perspectives*, G.L. Wells and E.F. Loftus, eds.) 1984, pp. 174, 190, 196.

The suggestions may be very subtle. For example, the *Sprynczynatyk* hypnotist's 32 questions about the boy's feet were suggestions, for they told the boy what the hypnotist was interested in. The hypnotist's advice that "the mind can reach back and recollect things . . . . We have only to reach back and recall it" was also a suggestion—very powerful—that the subject has it "all in his head"; that kind of suggestion encourages invention. See Orne, "The Use and Misuse of Hypnosis in Court," in *Critical Issues in American Psychiatry and the Law*, Vol. 2 (Richard Rosner, ed.) 1985, p. 219.

Suggestions can also be quite unintentional. A hypnotist is apt, by subtle cuing, unwittingly to suggest re-

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stated . . . [W]hatever can be done by hypnosis can also be done without hypnosis; it merely takes longer and requires greater skill and patience."

sponses to the subject in hypnosis. (See Orne, "The Forensic Use of Hypnosis," U.S. Department of Justice, National Institute of Justice/Research in Brief, December 1984, p. 4; Diamond, *supra* at 333; Laurence and Perry, "Hypnotically Created Memory Among Highly Hypnotizable Subjects," 222 *Science* 523, 524 (November 4, 1983); *Rock*, 708 S.W.2d at 81.) For example, the *Sprynczynatyk* hypnotist testified that he tried not to suggest anything, although he did. Suggestions are also very hard to detect. Even an expert examining a videotape of a hypnosis session may not be able "to identify possible cues." *Id.*, at 82, n.2.

Suggestions, witting or not, are effective. For example, Dr. Orne testified that the *Sprynczynatyk* hypnotist's suggestions would "assure a change in memory."

Confabulation. One under hypnosis may "confabulate." Confabulation means making up details one does not recall but that seem to fit. *See* 708 S.W.2d at 81.[7] Neither the hypnotist nor patient can tell what is confabulation and what is real memory without checking what the patient says against objective data. Neither can a trier of fact, or anyone else. (*See* American Medical Association, Council on Scientific Affairs, "Scientific Status of Refreshing Recollection by the Use of Hypnosis," 253 Journal of the American Medical Association 1918, 1922 (April 5, 1985); *Rock*, 708 S.W.2d at 80, 81, quoting Diamond and Orne.)

For example, the *Sprynczynatyk* hypnotist could not really tell what was real and what made up. But the boy said three things which could be checked against objective data. They showed he confabulated. Thus under hypnosis he said he watched "The Price Is Right" on TV on the accident day, but it was on before he got up; he said he

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[7] The hypnotized person "translate[s] hunches, beliefs, and fantasies into memories, recollections, and reported facts." Orne, et al., "The Forensic Use of Hypnosis," U.S. Department of Justice, National Institute of Justice/Research in Brief, December 1984, p. 4.

watched "The Beverly Hillbillies" also, but it was not on at all that day; and he said his sister fed the dogs, but she was out of town.

Hopes. Hypnosis plays on hopes and fantasies, and in hypnosis a strong hope very likely will become memory.[8] (See Orne, "The Use and Misuse of Hypnosis," *supra* at 216; cf., *Rock*, 708 F. S.W. 2nd at 81.)

For example, before hypnosis the *Sprynczynatyk* boy had heard about some brake problem in Chevrolet Citations. He wanted to be hypnotized to find out whether the accident was his fault or the car's, and naturally he hoped very much it was the car's. He followed where he was led; no doubt any human being would have wanted to get there.

Altered Witness. One believes that what he relives in hypnosis really happened, and with great conviction. Believing he has found truth, he will likely be a most confident witness.[9] Indeed, he "dissociates accuracy of memory from confidence" in memory (Orne, "Hypnotically Induced Testimony" at 193,) and becomes "immune to all cross-examination." Diamond, *supra* at 336; Rock, 708 S.W. 2d at 81.

In sum, neither subject nor hypnotist can tell whether what the subject says in hypnosis is fact or fantasy. That is so no matter how conscientious the hypnotist.[10]

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[8] *Cf. People v. Shirley*, above, 31 Cal. 3d at 31-32 (where subject has motive to distort truth "to make himself look better in the eyes of others," hypnosis gives him "permission" to distort).

[9] The *Sprynczynatyk* hypnotist repeatedly asked the boy to describe details as to what happened on the accident day. As Dr. Orne testified, those questions elicit answers that convince the patient that what he says "must have been so, because otherwise why would I know all those details?" The patient believes, again, that he has found truth. See *Rock*, 708 S.W.2d at 81.

[10] That is also true even where one has no memory before hypnosis. When one has memory of an event, it is extremely unlikely

IV. THE LAW

As the Supreme Court of Arkansas found, there is a "current trend toward exclusion" of hypnotically induced testimony. *Rock*, 708 S.W. 2d at 79. In fact, the majority of jurisdictions to pass on the question since 1980 have held the testimony inadmissible. As *Rock* also found, another group of jurisdictions have held the testimony admissible only if "certain safeguards have been followed to minimize . . . [the] dangers" of hypnosis. *Ibid.* We believe the exclusionary rule is the better rule and, according to McCormick, it is now the "prevalent" rule. (Cited at *Rock*, 708 S.W. 2d at 80). We discuss the exclusionary rule first (Part A, below), and then the safeguards rule. (Part B, below).

A. The Exclusionary Rule; the Old Law and the New Law

In 1968 the Maryland Court of Special Appeals affirmed the admission into evidence of hypnotically induced testimony, the first court in the United States to do so. *Harding v. State*, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. den.*, 395 U.S. 949 (1969). Over the next decade, several jurisdictions followed *Harding*, including the Ninth Circuit, the first and, until the end of 1986, the only federal circuit court, even arguably,[11] to follow it.

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that a different memory generated by hypnosis will be the more accurate one. For the waking memory is far more reliable than the hypnotic memory which comes afterward, and the error rate after hypnosis is three times the error rate in the wake state before that. Dywan and Bowers "The Use of Hypnosis to Enhance Recall," 222 *Science* 184 (October 14, 1983). The unreliability of hypnosis is shown by "over two dozen scientific experiments during the past fifty years." Orne, et al., *Hypnotically Refreshed Testimony: Enhanced Memory or Tampering With Evidence?* U.S. Department of Justice, National Institute of Justice/Issues and Practices (1985).

[11] In *United States v. Kimberlin*, 805 F.2d 210 (7th Cir. 1986), an investigation in which witnesses were hypnotized occurred in 1978, and the trial in 1981. *Id.* at 217. The Court noted that

Wyller v. Fairchild Hiller Corp., 503 F.2d 506, 509 (9th Cir. 1974); *Kline v. Ford Motor Co., Inc.*, 523 F.2d 1067 (9th Cir. 1975); *United States v. Adams*, 581 F.2d 193 (9th 1978); *United States v. Awkard*, 597 F.2d 667 (9th Cir. 1979). *Harding* and its descendants did not consider whether hypnosis as memory restorer is reliable or accepted generally or at all by scientists, and did not consult the large body of scientific literature that said it is not. They simply held that the fact a witness has been hypnotized goes to credibility, not admissibility. *See, e.g., Collins v. State.* 52 Md. App. 186, 447 A.2d 1272, 1278 (1982) (commenting on *Harding*); *People v. Shirley*, 31 Cal. 3d 18, 35-36, 641 P.2d 775, *cert. den.*, 458 U.S. 1125 (1982) (commenting on *Harding*'s descendants).

Harding and descendants overlooked *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923), and the fifty (now sixty-four) years of precedent that followed it. *Frye* held that the result of a scientific technique (there a lie detector test) is inadmissible unless the technique has "gained general acceptance in the particular field in which it belongs." 293 Fed. at 1014. Hypnosis is a scientific technique, and hypnotically induced testimony its result. Accordingly, *State v. Mack*, 292 N.W. 2d 764, 767-68 (Minn. 1980) held the *Frye* "general acceptance" test applicable to hypnosis. Thereafter, case after case followed *Mack*, and the "most recent decisions by other

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Harding was then a "leading case." *Ibid.* Although the Court also noted "several dangers . . . associated with hypnosis," and that several jurisdictions had declined to follow *Harding*, it declined to adopt the exclusionary rule or the safeguards rule. The Court stated two reasons: (1) the safeguards were not developed at the time of the *Kimberlin* investigation, and (2) there was "so little probability that any testimony resulting from suggestion or confabulation in the course of hypnosis affected the outcome [in the case]." *Id.* at 219. The Court therefore left to later cases "[w]hatever rules may evolve in this circuit on this subject . . . ." *Ibid.* See also discussion in *Harker v. State of Maryland*, 800 F.2d 437 (4th Cir. 1986).

jurisdictions have consistently applied" *Frye*. *Collins v. State*, 447 A.2d 1272, 1279 (Md. 1982); *Commonwealth v. Kater*, 388 Mass. 519, 447 N.E. 2d 1190, 1196 (Mass. 1983) (the "substantial majority" applies *Frye*).[12]

Mack and its descendants exhaustively reviewed the scientific literature and experts' opinions—most prominently Drs. Orne's and Diamond's—respecting hypnosis. Upon that review, *Mack* and every case after it applying *Frye* found that hypnosis, even if properly conducted, fails *Frye's* test: Hypnosis is not "generally accepted" by the scientific community as a reliable means to restore, refresh, or find memory. To the contrary, the "overwhelming consensus of expert opinion" is that it is not reliable, and there is no "doubt" about that. *People v. Shirley*, above, 31 Cal. 3d at 23, 40, 66.

Hypnosis as memory restorer or finder is not generally accepted as reliable by experts in the field for the same reasons Drs. Orne and Diamond have explained it is not: (1) The hypnotic subject is "highly susceptible to suggestion," even "that which is subtle and unintended," and his "critical judgment" is impaired. (2) The subject "has a compelling desire to please the hypnotist by reacting positively to these suggestions." (3) Neither subject nor hypnotist nor anyone else can tell whether a memory generated during hypnosis is fact, fantasy, or confabulation. (4) The subject becomes utterly "convinced of the absolute truth of the account he made while under hypnosis", and it is "impossible to cross-examine such a witness in a meaningful way". E.g., *State v. Mack*, above, 292 N.W. 2d at 768-69; *People v. Shirley*, above, 31 Cal.3d at 43-44; 65-66; *Collins v. State*, above, 447 A.2d at 1280.

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[12] The *Rock* court did not resolve whether *Frye* applied, because it "would find the hypnotically induced testimony inadmissible by either the *Frye* test, or some form of it, or by traditional evidentiary concepts." 708 S.W.2d at 80.

Accordingly, every case following *Mack* and applying *Frye* holds hypnotically induced testimony inadmissible. *Prewitt v. State*, 460 S.2d 296 (Ct. Crim. App. Ala. 1984) (Alabama); *Contreras v. State*, 718 P.2d 129 (Ak. 1986) (Alaska); *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 196, 644 P.2d 1266, 1282 (1982) (Arizona); *State v. Mena*, 128 Ariz. 226, 624 P.2d 1274 (1981) (Arizona); *People v. Shirley*, 31 Cal.3d 18, 66, 641 P.2d 775, 796 (1982), *cert. denied*, 458 U.S. 1125 (1982) (California); *People v. Quintanar*, 659 P.2d 710, 711 (Colo. App. 1982) (Colorado); *State v. Atwood*, 479 A.2d 258 (Superior Ct. Conn. 1984) (Connecticut); *State v. Davis*, 490 A.2d 601 (Superior Ct. Dela. 1985) (Delaware); *Bundy v. State*, 471 So.2d 9 (Fla. 1985) (Florida); *Walraven v. State*, 336 S.E. 2d, 785 (Ga. 1985) (Georgia); *State v. Moreno*, 709 P.2d 103 (Ha. 1985) (Hawaii); *Peterson v. State*, 448 N.E.2d 673 (Ind. 1983) (Indiana); *State v. Haislip*, 701 P.2d 909 (Kan. 1985) (Kansas); *Collins v. State*, 52 Md. App. 186, 447 A.2d 1272, 1283 (1982) (Maryland); *Polk v. State*, 48 Md. App. 382, 427 A.2d 1401 (1981) (Maryland); *Commonwealth v. Kater*, 388 Mass. 519, 447 N.E.2d 1190 (1983) (Massachusetts); *People v. Gonzalez*, 415 Mich. 615, 329 N.W.2d 743, 748 (1982) (Michigan); *Alsbach v. Bader*, 700 S.W. 2d 823 (Mo. 1985) (Missouri); *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648, 655 (1981) (Nebraska); *People v. Hughes*, 88 A.D.2d 17, 452 N.Y.S.2d 929, 931 (1982) (New York); *State v. Peoples*, 311 N.C. 515, 319 S.E.2d 177 (N.C. 1984) (North Carolina); *Harmon v. State*, 700 P.2d 212 (Ct. Crim. App. Ok. 1985) (Oklahoma); *Commonwealth v. Nazarovitch*, 496 Pa. 97, 110, 436 A.2d 170, 177 (1981) (Pennsylvania); *State v. Martin*, 101 Wash.2d 713, 684 P.2d 651 (Wash. 1984) (Washington); and this case, *Rock v. State*, 708 S.W.2d 78 (Ark. 1986).[13]

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[13] All courts hold that the witness may testify to his prehypnosis recollection, see, e.g., *State ex rel. Collins v. Superior Court*, 644

As for *Harding* and descendants, by 1982 that was "moribund precedent." For in 1981 and 1982 the same Maryland court which decided *Harding* in the first place repudiated it, held that *Mack* and *Frye* govern instead, and so dealt the Harding line its "coup de grace." *See People v. Shirley*, above, 21 Cal.2d at 48; *Collins v. State*, above, 447 A.2d at 1278; *Polk v. State*, above, 427 A.2d at 1046. See *Rock*, 708 S.W.2d at 80.[14]

B. The Safeguards Rule

The Fifth Circuit was the second Circuit, after the Ninth, see p. 11 above, to address the hypnosis issue, and the first since *Mack*. *United States v. Valdez*, 722 F.2d 1196 (5th Cir. 1984). *Valdez* declined to follow *Frye, Mack et al.*, on the ground that *Frye* applied to testimony of experts, not lay witnesses (like a hypnotized subject.)[15] Instead, *Valdez* looked to Federal Rule of Evidence 403.

Rule 403 provides for exclusion of evidence whose "probative value" is substantially outweighed by the "danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." *Valdez* reviewed the literature and case law, and found the same shortcomings respecting hypnoti-

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P.2d at 1295, although one holds that he may not testify to his prehypnosis recollection of the event which was the subject of hypnosis. *People v. Shirley*, above. All hold that hypnosis may be used as an investigative tool. *See*, e.g., *State v. Mack*, 292 N.W.2d at 771.

[14] There have been a few cases which have followed *Harding* since 1980. See, for example, *Chapman v. State*, 638 P.2d 1280 (Wyo. 1982); *State v. Armstrong*, 110 Wis. 2d 555, 329 N.W. 2d 386, *cert. denied*, 461 U.S. 946 (1983); and *State v. Brown*, 337 N.W. 2d 138 (N.D. 1983) (but noting importance of safeguards and corroboration.)

[15] However, the testimony of the hypnotized subject is the result of a scientific technique, hypnosis. Therefore that testimony is subject to the *Frye* test, and hypnosis fails the test. See subpart A, above.

cally induced testimony that *Mack* did: The subject's suggestibility, his desire to please the hypnotist, the impossibility of telling memory from confabulation, the ineffectiveness of cross-examination. 722 F.2d at 1201-02. Consequently, *Valdez* found the probative value of hypnotically induced testimony low, and the danger of it causing prejudice and confusion high.

Valdez concerned an officer who after hypnosis identified one as the person whom he'd seen at the scene of the crime. The officer knew the person was under suspicion. *Valdez* held (1) where a "hypnotized subject identifies for the first time a person he has reason to know is already under suspicion, the post-hypnotic testimony is inadmissible whatever procedural safeguards were used to attempt to sanitize the hypnotic session." *Valdez* said (2) in other cases, "if adequate procedural safeguards have been followed, corroborated post-hypnotic testimony might be admissible"—uncorroborated testimony being, according to experts, "useless." Id. at 1203.

Valdez pointed to *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981). *Hurd* struck a middle course between *Mack* and *Harding*. It held that hypnotically induced testimony might be admitted if the hypnosis session followed "rigorous procedural safeguards" meant to guard against "the hypnotic creation of pseudomemories." *Valdez* at 1199.

These are the *Hurd* safeguards *Valdez* pointed to:

> "(1) the hypnotist must be a qualified psychiatrist or psychologist who has experience in the use of hypnosis; (2) the hypnotist 'should' work independently, not as agent for either party to the litigation; (3) all information given to the hypnotist before the hypnosis session must be recorded; (4) before hypnosis, the subject must describe the facts to the hypnotist as he then remembers them; (5) all 'contact' between the hypnotist and the subject must be recorded, preferably on viodeotape; and (6) no person other than hypnotist and subject 'should' be pres-

ent during any 'contact' between the two." *Valdez*, 722 F.2d at 1199; *Hurd*, 432 A.2d at 89.

Sprynczynatyk essentially followed *Valdez* and *Hurd*.

Compliance with those safeguards is a "condition precedent for the admissibility of hypnotically induced recollection" under *Hurd-Valdez*. 432 A.2d at 96; 722 F.2d at 1203.[16]

The safeguards were originally proposed by Dr. Orne. He believed that, for example, the hypnotist should record what he was told before the interview, so there is no doubt what he knew about it; for a hypnotist who knows what is at issue is more apt, by subtle cuing, unwittingly to suggest responses to the subject by hypnosis. Dr. Orne also believed the hypnosis session should be recorded, so there is no doubt what is said during it; that makes it easier to determine when a hypnotist suggests a response during it. Orne, "Hypnotically Induced Testimony," *supra*, at 206.

However, Dr. Orne proposed the safeguards to reduce the danger that hypnosis might intentionally suggest the recollection of helpful facts in jurisdictions where hypnotically induced testimony is admitted, and in connection with the use of hypnosis in investigations. See, e.g.,

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[16] *Hurd's* following includes *House v. State*, 445 So.2d 815. (Miss. 1984); *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (1981); *State v. Weston*, 475 N.E. 2d 805 (Ohio Ct. App. 1984); and the Oregon legislature. (Or. Rev. Stat. § 136.675 (1981.)

Virtually all cases admitting hypnotically induced testimony require a showing that the hypnosis session meets some safeguards, even if not the *Hurd* safeguards. For example, the Ninth Circuit, perhaps the most aggressive jurisdiction, recognizes that hypnosis "carries a dangerous potential for abuse," and requires "at a minimum, complete stenographic records of interviews of hypnotized persons who later testify . . . ." *United States v. Adams*, 581 F.2d at 198-99, n.12. The Ninth Circuit also requires the trial court to hear "objections to the . . . testimony on the ground that such procedures [minimum standards] were not followed." *United States v. Awkard*, above, 597 F.2d at 669, n.2.

Valdez, 722 F.2d at 1200. He recognized, however, that the safeguards do not eliminate the risk of confabulation inherent in hypnosis. Indeed, his opinion is that "[t]here is no way . . . by which anyone (including an expert with extensive experience in hypnosis) can for any particular piece of information obtained in hypnosis determine whether it is an actual memory or a confabulation." Quoted at *Rock*, 708 S.W.2d at 81.

In sum, compliance with the safeguards helps, and is essential if hypnotically induced testimony is to be admitted. But compliance does not change the truth that hypnotically induced testimony is inherently unreliable. Therefore *Mack* and its following, including *Rock*,[17] exclude hypnotically induced testimony entirely; the safeguards alone do not solve the problem. See, e.g., *Collins v. State*, above, 447 A.2d at 1280-81; *Rock*, 708 S.W.2d at 82-83.

The *Mack* rule is the majority rule and the better rule: It is firmly grounded in the "overwhelming consensus" of the scientific community, it protects the integrity of the judicial process, and it ensures that the search for truth is not subverted by what is, ultimately, manufactured evidence.

V. COMMENTS ON ROCK

The consensus among experts is that hypnosis is not reliable to restore memory; *Frye* and traditional evidence concepts require its exclusion. The Petitioner in *Rock* argues, nevertheless, that "the test of intelligent cross-examination is a better means of dealing with" hypnosis than is exclusion. (Petitioner's Brief, p. 13) But hypnosis destroys the ability to cross-examine ,pp. 9-10, 12-13,

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[17] *Rock* also points out, quoting *Shirley*, above, that questions as to whether the guidelines have been complied with "would provide a fertile new field for litigation," and concludes that "the game is not worth the candle."

above, and no one—neither subject, hypnotist nor trier of fact—can determine whether hypnotically induced recall is fact or fantasy.

Petitioner also argues that the exclusion of hypnotically induced testimony "assumes an untruthful and devious hypnotist." (Petitioner's Brief, p. 13) But the dangers of hypnosis are inevitable and are not cured by a well-meaning hypnotist; the dangers are inherent in the process itself.

Finally, petitioner argues that "the burden should be on the prosecution to establish that the testimony is likely the product of improper suggestion." (Petitioner's Brief, p. 6) But *Frye* requires the proponent of the scientific evidence to prove its general acceptance, not the opponent to prove its unacceptance. And *Valdez-Hurd* require the proponent to prove the safeguards were met, not the opponent to show they were not. That is only fair; the proponent sponsors the hypnosis in the first place, and is in the best position to ensure that his hypnotist complies with the safeguards.[18]

In sum, hypnosis as memory restorer is unreliable. Petitioner does not challenge that fact, or meet the case law which excludes hypnotically induced testimony because of that fact.

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[18] The petitioner also suggests that whether hypnotically induced testimony is admissible is a competence question. (Petitioner's Brief, p. 8) It is not. A "previously hypnotized witness is not incompetent in the strict sense of being unable to express himself comprehensibly or understand his duty to tell the truth . . . or of lacking the general capacity both to perceive and remember . . ." *People v. Shirley*, above, 31 Cal.3d at 67. The exclusion of hypnotically induced testimony "does not make incompetent a witness." *United States v. Valdez*, above, 711 F.2d at 1204. Rather, the question is what a competent witness—like the hypnotized witness in *Rock*—could testify to. The answer is she could, like other competent witnesses, testify to some things but not others. She could, and apparently did, for example, testify to her pre-hypnotically in-

VI. CONCLUSION

The *Rock* court's analysis of hypnotically induced testimony accords with the analysis of the scientific community; it accords with the best reasoning of current case law; and it accords with the majority rule in this country.

Respectfully submitted,

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duced recollection, but she could not testify to hearsay or some opinions. And she could not testify to her hypnotically induced recollection under *Frye* and, as *Rock* found, "standard rules of evidence." 708 S.W.2d at 85.

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AMICUS CURIAE BRIEF OF THE STATE OF CALIFORNIA, JOHN K. VAN DE KAMP, ATTORNEY GENERAL

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Is Arkansas' evidentiary rule admitting the pre-hypnotic perceptions and memories of a witness, including a criminal defendant, but excluding the post-hypnotic perceptions and memories of a witness, including a criminal defendant, constitutionally permissible?

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AMICUS CURIAE BRIEF OF THE STATE OF CALIFORNIA, JOHN K. VAN DE KAMP, ATTORNEY GENERAL

Amicus files this brief pursuant to Rule 36.4 of the Supreme Court of the United States.

INTEREST OF AMICUS

This brief is respectfully submitted in support of respondent, who

urges affirmance of petitioner's conviction in Rock v. State of Arkansas 708 S.W.2d 78 (Ark. 1986). There, the Arkansas Supreme Court held that events recalled by the defendant as the result of being hypnotized for the purpose of refreshing her recollection were inadmissible at trial because hypnosis is not a reliable technique for producing truth.

The use of hypnosis has long been an effective therapeutic tool, used by psychiatrists, psychologists, and other health care professionals to help patients to deal with traumatic situations, to remember repressed events, or merely to relax.

Much more recently, hypnosis has begun to be used as an investigative tool by both the prosecution and the defense in criminal

cases. It is similar to the standard interview of percipient witnesses in any criminal case, but its virtue is that it allows witnesses to relax and to concentrate, more effectively than in the standard interview, on the events of the crime they have observed. Effective investigative hypnosis enhances the recall of percipient witnesses to crime and thus is an invaluable investigative technique for both the prosecution and the defense. To the extent that it aids in the conviction of the guilty and the exoneration of the innocent, amicus submits that it is a technique which should be approved by this Court.

Investigative hypnosis is a relatively new field, however, and is thus inevitably the subject of much controversy. While experts in the

field of investigative hypnosis proclaim its virtues and deny any vices, some experts (and so-called experts) in the health care fields are critical of the use of hypnosis, urging everything from caution in its use to an outright ban on the technique.1/ The concerns expressed about the use of hypnosis in the investigation of criminal cases are the same concerns expressed about the admissibility of any evidence (e.g., line-up identification): that is, is the

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1. California has adopted the latter position: the use of investigative hypnosis by California law enforcement officers results in the hypnotized witness' testimonial incapacity at trial. (See People v. Shirley 31 Cal.3d 18 (1982), cert. den. 459 U.S. 860 (1982); People v. Guerra 37 Cal.3d 385 (1984); but see also California Evid. Code, § 795.) Criminal defendants in California, however, are exempt from this otherwise absolute exclusionary rule. (People v. Shirley, supra, 31 Cal.3d at 67.)

evidence reliable or is the procedure used so suggestive as to render the evidence unreliable? To the extent that hypnosis, employed by either the prosecution or the defense, produces unreliable evidence, it is a technique which should be disapproved by this Court.

Since investigative hypnosis is a remarkably effective technique when used by the prosecution or the defense in the investigation of criminal cases, it is amicus' interest that the technique be approved by this Court. To the extent that investigative hypnosis produces unreliable evidence, however, that evidence should be inadmissible in any criminal proceeding. Acknowledging the unresolved dispute among hypnotists about the reliability of the technique,

amicus submits that the position adopted by the Arkansas Supreme Court in this case is a reasonable, constitutionally permissible position. First, events perceived and recalled by any witness prior to being hypnotized for investigative purposes are admissible in Arkansas, for they are free of any undue suggestion which may be inherent in the hypnosis process. Second, events perceived and/or recalled as a result of the hypnosis session are inadmissible, because Arkansas has found that as yet there is little agreement among hypnosis experts as to their reliability.[2/] Third, the rules governing the admissibility of

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2. The product of any hypnosis session could of course stimulate further investigation by the party using the technique, as, indeed, it did in the investigation of petitioner's case below.

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the testimony of previously hypnotized witnesses must apply equally to the prosecution and the defense, for our system of justice decries the introduction of unreliable evidence by either party.

For these reasons, amicus contends that it is constitutionally permissible for the State of Arkansas to allow defendant Rock to testify at her criminal trial as to matters which she perceived and recalled prior to being hypnotized but to prohibit defendant Rock from testifying as to matters which she perceived and/or recalled as a result of the hypnosis session.

SUMMARY OF ARGUMENT

Hypnotizing percipient witnesses to crime is an effective information-gathering technique in the

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investigation of a criminal case for both the prosecution and the defense.

Critics of investigative hypnosis cite dangers in the use of the technique, arguing that the product of hypnosis may be unreliable. Investigative hypnotists contend that the technique is effective and produces reliable and otherwise unavailable information.

In response to this dispute, courts have taken one of four positions as to the admissibility of the testimony of previously hypnotized witnesses:

1. The fact of hypnosis goes to weight, not the admissibility, of hypnotically produced evidence.

2. A previously hypnotized witness may testify to both pre- and post-hypnotic perceptions and memories

BEST AV

if specified safeguards in the hypnosis procedure are employed.

3. A previously hypnotized witness may testify to pre-hypnotic perceptions and memories but not to post-hypnotic perceptions and memories, for there is still some dispute about the reliability of the latter. (This is the position of Arkansas in the instant case.)

4. A previously hypnotized witness, for either the prosecution or the defense, is rendered unavailable to testify as to any matters related to those covered in the hypnosis session. Criminal defendants are exempt from this exclusionary rule.

Amicus contends that the first three positions are constitutionally permissible evidentiary decisions by state and

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federal courts, while the fourth position is constitutionally impermissible because it violates the right to due process of law.

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ARGUMENT

I

THE USE OF HYPNOSIS IS AN EFFECTIVE TECHNIQUE IN THE INVESTIGATION OF CRIMINAL CASES, BUT, BECAUSE OF THE DISPUTE AMONG HYPNOTISTS ABOUT THE RELIABILITY OF THE TECHNIQUE, ARKANSAS' DECISION TO EXCLUDE POST-HYPNOTIC PERCEPTIONS AND MEMORIES IS CONSTITUTIONALLY PERMISSIBLE.

In 1958, the Council on Mental Health of the American Medical Association, after an extensive two-year study, endorsed hypnosis as a therapeutic technique.[3/] Shortly thereafter, interest in hypnosis as a tool in the investigation of crime began to grow, and, by 1972, the Los Angeles, California, Police Department (LAPD) was using hypnosis on

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3. Spector and Foster, Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible? 38 Ohio State L.Rev. 567 (1977).

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an occasional basis as an aid in gathering evidence in homicide cases.[4] When this use of hypnosis proved successful, the LAPD devised a one-year project to test the feasibility of training experienced police investigators to use hypnosis techniques with volunteer witnesses and victims to enhance their recall about the events of a crime.[5] This project was carried out in 1975-1976, and, in the 70 investigations in which hypnosis was used, it was estimated that in about 77% of them information was elicited by hypnosis of importance to the case investigator that had not previously been elicited during routine

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4. Martin Reiser, Handbook of Investigative Hypnosis, LEHI Publishing Co., L.A., p. xiv (1980).

5. Id., at p. xv.

interviews.[6] As a result of this success, Dr. Martin Reiser of the LAPD established the Law Enforcement Hypnosis Institute in 1976, an institute which provided training in hypnosis to criminal justice agencies interested in adding the technique of hypnosis to their other investigative tools.[7] Estimates are that hypnosis was used[8] as an investigatory tool by the LAPD, for example, in over 50% of

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6. Id.

7. Id., at p. xvi.

8. Amicus uses the past tense advisedly. In 1982, the California Supreme Court, in the case of People v. Shirley, supra, 31 Cal.3d 18, ruled that the testimony of a witness who has undergone hypnosis for the purpose of restoring his memory of the events in issue is inadmissible as to all matters relating to those events, from the time of the hypnotic session forward." (Id. at 66-67.) This exclusionary rule virtually eliminated the use of investigative hypnosis in California.

its cases.[9] Thus, hypnosis can be a remarkably effective tool in the investigation of a criminal case by law enforcement.

Hypnosis is, of course, an equally effective investigative technique when used by the defense, whether the subject is the defendant or a defense witness. Moreover, in California at least, the right of a defendant in a criminal case to be hypnotized is an adjunct of the accused's right to counsel and is often an essential tool in the preparation of the accused's defense.[10]

Although experts do not agree on an exact definition of hypnosis or

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9. Fountain, Hypnosis: Understanding Its Use in the Criminal Process 11 Texas Tech. L.Rev. 113, 122-1232 (1979).

10. See Cornell v. Superior Court of San Diego County 52 Cal.2d 99 (1959).

on a theory as to how it works,[11] there is considerable agreement about its uses, its limitations, and the potential for its abuse. First, unlike the polygraph test or the use of sodium pentathal, hypnosis is not a tool for ascertaining truth or falsity. Rather, it is merely an effective technique for reviving or refreshing memory, regardless of the truth or falsity of that memory and the perceptions from which that memory derives.[12] Hypnosis does not guarantee that the memory will be refreshed, nor does it insure that the memory, once refreshed, will be any more reliable or accurate than memory recalled without the aid of hypnosis. Hypnosis cannot even guarantee that the

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11. See Spector and Foster, supra, at page 569.

12. See Spector and Foster, supra, at pages 584-591.

hypnotized subject will not lie under hypnosis.13/ In sum, hypnosis is but another technique for gathering evidence which then can be presented to the triers of fact for their evaluation.

Second, although hypnosis is not a tool for ascertaining truth or falsity, it is an extremely effective aid in reviving or refreshing memory. For example, as an investigative tool, hypnosis was used on the bus driver in the famous Chowchilla kidnapping case.14/ Under hypnosis, the bus

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13. See People v. Lopez 110 Cal.App.3d 1010 (1980).

14. In 1976, three young men stopped and took control of a Chowchilla, California, school bus full of children and buried the bus and its occupants in a pre-prepared underground hiding place. The young men planned to keep the location of the buried school bus secret until they had collected a ransom from the town of Chowchilla. Fortunately, the occupants of the

driver was able to recall a key license plate number which he had previously been unable to recall and which led to the arrest of the kidnappers in that case.[15] As a defense tool, hypnosis is important in assisting the accused prepare his defense, particularly where the accused, because of intoxication, trauma, or other relevant mental states, "is unable to remember his whereabouts and activities during the critical time involved. . . ."[16] The virtue of hypnosis is that it allows the hypnotized subject to relax to the

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school bus were able to climb to safety out of the bus' "grave."

15. See Diamond, Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness, 68 Cal. L.Rev. 313, 315-316, footnote 7(f) (1980).

16. Cornell v. Superior Court of San Diego County, supra, 52 Cal.2d at page 101.

extent that the subject can concentrate on a past event in a focused way that is generally not possible without hypnosis.[17/] Thus, the effectiveness of hypnosis as an information-gathering tool is unquestioned.

However, despite general agreement about the nature and effectiveness of hypnosis as an information-gathering technique, some critics of investigative hypnosis contend that there are three major dangers of hypnosis as an investigative tool. First, according to these critics, there is the problem of suggestibility, the risk that what the hypnotist says or does will suggest responses to the subject under

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17. See People v. Boudin 460 N.Y.S.2d 879, 881 (Sup. 1983).

hypnosis.[18] Since hypnosis is by its very nature a suggestible state of consciousness and since there is often a bond between hypnosis and subject wherein the subject desires to please the hypnotist, there is some danger that if the hypnotist asks leading or suggestible questions, the subject will adopt the hypnotist's suggestion rather than answering from his own memory.[19] Second, there is the possibility, according to critics, that a subject under hypnosis will deliberately lie or confabulate (compensate for loss of memory by fabricating details which provide a response to the hypnotist's

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18. See Spector and Foster, supra, 38 Ohio State L.Rev. 567; Fountain, supra, 11 Texas Tech. L.Rev. 113.

19. See State v. Hurd, 173 N.J.Super. 333, 414, A.2d 291, affirmed 86 N.J. 525, 432 A.2d 86 (1981).

question or request).[20] Third, critics contend that a previously hypnotized witness will be impervious to cross-examination, his or her perceptions or memories having become "concreted" by the hypnotic process.[21]

Experts in the field of investigative hypnosis dispute these dangers in the use of investigative hypnosis.[22] They contend that the hypnotic state is no more a suggestible state than any other.[23] Moreover, while investigative hypnotists agree that a subject can lie under hypnosis,

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20. See Spector and Foster, supra.

21. See People v. Boudin, supra, 460 N.Y.S.2d 879, 881 (Sup. 1983).

22. See Reiser, Police Use of Investigative Hypnosis: Scientism, Ethics, and Power Games, American Journal of Forensic Psychology, Volume II, No. 3, 115 (1984).

23. Id. at 116-117.

just as he/she can in any interview situation, they contend that hypnosis does not distort memory or create false memory.[24] Finally, investigative hypnotists deny that a hypnotized subject's perceptions or memories are "concreted" by the hypnotic process.[25]

Ultimately, when a witness in a criminal case has been hypnotized prior to trial, there are several legal principles at stake. First, of course, is the need by both sides to discover as much evidence as possible about the crime and who committed it. Second is the entitlement of both parties to a fair trial,[26] including the testimony of percipient witnesses who are

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24. Id. at 119-122.)

25. Id. at 128.

26. See U.S. v. Nixon 418 U.S. 683, 708-709 (1974).

testifying from their own personal knowledge about the events of the crime, and the right to effective cross-examination of all witnesses by both parties. In response to these legal principles, which can sometimes be in conflict in hypnosis cases, the following positions have been taken by courts across the country with respect to the admissibility of the testimony of a witness who has been hypnotized prior to trial.

1. The majority view in the state and federal courts is that hypnotically induced testimony is admissible, that the fact that hypnosis produced the evidence goes to the weight not the admissibility of the evidence.[27/]

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27. United States v. Adams, 581 F.2d 193 (9th Cir. 1978); cert. denied, 439 U.S. 1006, 99 S.Ct. 621, 58 L.Ed.2d

2. A related but slightly stricter view is that a previously hypnotized witness may testify to events perceived prior to hypnosis and to events the memory of which was refreshed or revived by hypnosis, if adequate procedural safeguards are utilized to insure that the witness is

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683; United States v. Awkard, 597 F.2d 667 (9th Cir. 1979), cert. denied, 444 U.S. 885, 100 S.Ct. 179, 62 L.Ed.2d 116; United States v. Miller, 411 F.2d 825 (2nd Cir. 1969); United States v. Narciso, 446 F.Supp. 252 (E.D.Mich. 1977); Wyller v. Fairchild Hiller Corp., 503 F.2d 506 (9th Cir. 1974); Kline v. Ford Motor Co., 523 F.2d 1067 (9th Cir. 1975); Chapman v. State, 638 P.2d 1280 (Wyo. 1982); Clark v. State, 379 So.2d 372 (Fla.App. 1979); People v. Smrekar, 68 Ill.App.3d 379, 24 Ill.Dec. 707, 385 N.E.2d 848 (Ill. 1979); Creamer v. State, 232 Ga. 136, 205 S.E.2d 240 (Georgia 1974); State v. Jorgensen, 8 Or.App. 1, 492 P.2d 312 (Oregon 1971); Pearson v. State, 441 N.E.2d 468 (Ind. 1982); State v. Beachum, 97 N.M. 682, 643 P.2d 246 (N.M. 1981); State of Louisiana v. Wren, 425 So.2d 756 (Louisiana 1983); Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (Georgia 1979).

testifying from personal knowledge and present memory, that there was no improper suggestibility at the hypnosis session, and that there is adequate corroboration of the information induced by hypnosis to insure the reliability of that information.28/

3. A more recent approach is that adopted by Arkansas in the Rock case: once a witness has been hypnotized, he or she may not testify as to events recalled as a result of hypnosis, but may testify as to events recalled prior to hypnosis. This position allows the testimony of

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28. Sprynezynatyk v. General Motors Corp. 771 Fd 1112 (1985); State v. Hurd, supra, 173 N.J.Super. 333, 414 A.2d 291, affirmed 86 N.J. 525, 432 A.2d 86 (1981); People v. Lewis, 103 Misc.2d 881, 427 N.Y.S.2d 177 (1980); People v. Lucas, 107 Misc.2d 231, 435 N.Y.S.2d 461 (1980) and People v. McDowell, 103 Misc.2d 831, 427 N.Y.S.2d 181 (1980).

percipient witnesses but does preclude their testimony as to matters perceived or recalled as a result of hypnosis.29/

4. Standing alone is the case of People v. Shirley, supra, 31 Cal.3d 18, which holds, as noted above,

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29. State v. Peoples 319 S.E.2d 177 (N.C. 1984); State ex rel. Collins v. Superior Court of County of Maricopa, 644 P.2d 1266 (Arizona 1982); Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (Pa.1981); Polk v. State, 48 Md.App. 382, 427 A.2d 1041 (Md. 1981); People v. Tait, 99 Mich.App. 19, 297 N.W.2d 853 (Md.App. 1980); People v. Blair 25 Cal.3d 640, 159 Cal.Rptr. 818, 602 P.2d 738 (1979); People v. Hanosleben, 86 Mich.App. 718, 273 N.W.2d 539 (Mich.App. 1978); Greenfield v. Robinson, 413 F.Supp. 1113 (W.D.Va. 1976); Rodriquez v. State, 327 So.2d 903 (Fla.App. 1976); Jones v. State, 542 P.2d 1316 (Okl.Cr. 1975); Emmett v. State, 232 Ga. 110, 205 S.E.2d 231 (Ga. 1974); State v. Pierce, 263 S.C. 23, 207 S.E.2d 414 (S.C. 1974); Greenfield v. Commonwealth, 214 Va. 710, 204 S.E.2d 414 (Va. 1974); People v. Harper, 111 Ill.App.2d 204, 250 N.E.2d 5 (Ill.App. 1969); State v. Harris, 241 Or. 224, 405 P.2d 492 (Oregon 1965); People v. Hughes 88 A.D.2d 17, 452 N.Y.S.2d 929 (N.Y. 1982).

that "the testimony of a witness who has undergone hypnosis for the purpose of restoring his memory of the events in issue is inadmissible as to all matters relating to those events, from the time of the hypnotic session forward."30/ Criminal defendants are exempt from this exclusionary rule.31/

Amicus contends that the views expressed in People v. Shirley, set forth above, are unsound for the following reasons. First, the Shirley case relied almost exclusively on the California Law Review article of Bernard Diamond entitled "Inherent Problems In The Use Of Pretrial Hypnosis On A Prospective Witness."32/

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30. Id. at 66-67.

31. Id. at 67.

32. Diamond, 68 Cal.L.Rev. 313, 1980, supra.

Although Diamond was the "expert" to whom the California court deferred in its aberrant ruling, Diamond is, by his own admission, not an expert in the field of therapeutic or investigative hypnosis.33/

Second, applying the test of Frye v. United States, 293 F. 1013 (D.C.Cir. 1923) and People v. Kelley 17 Cal.3d 24 (1976), the Shirley opinion purported to preclude the admissibility of post-hypnotic memories because the technique of hypnosis has not gained general acceptance in the scientific community as a reliable procedure.34/ Acknowledging that the experts in the field do not agree on the reliability of hypnosis and thus that the product

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33. See People v. Boudin, supra, 460 N.Y.S.2d 879, 881 (Sup. 1983).

34. Id. at 51, et seq.

of this disputed technique should be inadmissible, the Shirley court then inexplicably and illogically chose the theories of one admitted non-expert (Diamond), adopted them as reliable, and held, based on those theories, that percipient witnesses are essentially rendered incompetent to testify at all if they have undergone investigative hypnosis. Thus, the Shirley court rendered not only the product of hypnosis inadmissible but also the previously hypnotized witness himself. Amicus contends that there is no scientific or legal basis for this total exclusion of the testimony of previously hypnotized witness and therefore that the Shirley opinion should be rejected as unsound.

Finally, for the reasons discussed more fully in Argument II,

infra, the Shirley holding must be rejected for it exempts criminal defendants from its per se exclusionary rule. The Shirley case excoriates[35] the unreliability of investigative hypnosis and then allows criminal defendants to use the technique and to offer its product, no matter how unreliable, as evidence in court.

In sum, amicus urges this Court to reject the Shirley rule not only because it is unsound but because it is constitutionally impermissible, for it precludes absolutely the prosecution or defense testimony of previously hypnotized percipient witnesses to crime, whether or not their testimony has been shown to be

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35. The Shirley opinion has been referred to as a "polemic." (See People v. Williams, 132 Cal.App.3d 920, 926 conc. opn. of Gardner, J. (1982).)

unreliable, thus depriving both the prosecution and the defense of due process of law in violation of the Fourteenth Amendment to the United States Constitution; and it permits the testimony of previously hypnotized criminal defendants, even if their testimony has been shown to be unreliable, thus depriving the People of due process of law.36/

The Shirley court did do one thing well and that was to identify the degree and intensity of the dispute among hypnotists as to the reliability of the perceptions and memories produced under hypnosis. Given that dispute, amicus submits that the position of the Arkansas Supreme Court is a reasonable and constitutionally

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36. See U.S. v. Nixon, 418 U.S. 683, 708 (1974).

permissible one: pre-hypnotic perceptions and memories of witnesses - whether prosecution witnesses, defense witnesses, or the defendant herself - are admissible; but perceptions and memories which are produced by hypnosis are not admissible, at least not at the present time, because experts in the field of hypnosis dispute their reliability. Accordingly, amicus urges affirmance of petitioner's conviction in Rock v. State of Arkansas 708 S.W.2d 78 (Ark. 1986).

II

THE TRIAL COURT'S RESTRICTION OF PETITIONER'S TESTIMONY TO EVENTS RECALLED PRIOR TO HER HYPNOTIC SESSION DID NOT VIOLATE HER RIGHT TO DUE PROCESS

Although she was allowed to testify at trial, petitioner contends that the trial court's ruling restricting her testimony to events recalled prior to her pretrial hypnotic session violated her right to due process under the Fourteenth Amendment by unduly restricting her right to prepare her defense and her right to testify on her own behalf. Petitioner's contention is meritless because, to the extent that trial courts may rely on evidentiary rules to restrict hypnotically-induced testimony by witnesses generally, they are not constitutionally required to make an

exception for defendants testifying on their own behalf.

As the Arkansas Supreme Court noted in the case at hand, rulings prohibiting criminal defendants from giving hypnotically-induced testimony[37/] and from testifying in an hypnotic trance[38/] have been upheld notwithstanding defense claims that these rulings violated due process. The Arkansas Supreme Court also correctly noted that, "Even defendants are subject to the rules of procedure and evidence, such as hearsay, or other instances of evidentiary exclusion, e.g., evidence that is prejudicial,

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37. State v. Atwood 479 A.2d 258, 264-265 (Conn. Super. 1984).

38. Greenfield v. Robinson, supra, 413 F.Supp. 1113, 1120 (W.D. Virginia 1976).

confusing, misleading, cumulative or time consuming."[39/]

That latter observation is borne out, for example, by a long line of California cases applying standard rules of evidence to criminal defendants: See People v. McNichol 100 Cal.App.2d 554, 556-559 (1950), report of statements made by the defendant while under the influence of sodium pentathol was properly excluded because the report was made up of hearsay and self-serving declarations and because the admission of such a report ". . . would open the door to the admission of hearsay and manufactured evidence without limit"; People v. Reese 65 Cal.App.2d 329, 349 (1944), trial court

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39. See Rock v. State of Arkansas, supra, 708 S.W.2d 78 (Ark. 1986).

properly excluded as hearsay a self-serving statement made by the defendant to his wife immediately after the charged homicide; People v. Blanchard 71 Cal.App. 402, 408 (1925), trial court properly excluded as hearsay the self-serving diary of the defendant; People v. Williams 32 Cal.2d 78, 83 (1948), trial court properly excluded as hearsay the self-serving statements of the defendant made to officers prior to the statement introduced by the prosecution; People v. Frye 166 Cal.App.3d 941, 949-951 (1985), trial court properly excluded as hearsay the defendant's self-serving statements made at the police station; People v. Guillebeau 107 Cal.App.3d 531, 549 (1980), trial court properly excluded proposed defense evidence that another individual may possibly have committed

the charged crime because the probative value of the evidence was outweighed by the probability that its admission would "create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury" under California Evidence Code section 352; People v. Cullen 37 Cal.2d 614, 626 (1951), trial court properly rejected a defendant's request that a psychiatrist be appointed to examine him while under the influence of sodium pentathol because any statements produced would be self-serving hearsay and because the psychiatrist's opinion as to the truthfulness of the statement would be conjectural; People v. Jones 52 Cal.2d 636, 653 (1959), trial court properly denied the defendant's request to testify under the influence of truth serum.

Although cases dealing with defense attempts to introduce hypnotically related evidence are few, these cases also support the holdings of State v. Atwood, supra, Greenfield v. Robinson, supra, and Rock v. State of Arkansas, supra, that trial courts properly applying existing evidentiary rules against the defense do not violate due process: See Jones v. State 542 P.2d 1316, 1326-1327 (Okl. Cr. 1975), defense hypnotist properly barred from expressing his opinion as to the truthfulness of defendant's exculpatory statements of his state of mind at the time of the offense based on a hypnotic interview because the results of using lie detectors, truth serum or hypnosis, when offered in evidence for the purpose of establishing the guilt or innocence of

the accused, are inadmissible; State v. Pusch 46 N.W.2d 508, 521-522 (N.D. 1950), trial court properly barred defense hypnotist from presenting the results of a hypnotic examination of the defendant regarding the facts of the case; People v. Hangsleben 273 N.W.2d 539, 543-544 (Mich. App. 1978), defendant's attempt to prove the reliability of statements made under hypnosis properly rejected; Rodriquez v. State 327 So.2d 903, 904 (Fla. App. 1976) exclusion of all statements made by defendant while under hypnosis upheld; see also People v. Diaz 644 P.2d 71, 73 (Colo. App. 1982), suggesting that on retrial a psychiatrist not be permitted to testify as to the mental state of the defendant if his opinion is based on information gained through hypnosis.

Although the California Supreme Court in People v. Shirley, supra, 31 Cal.3d 18, 67 (1982), held, in dicta, that pretrial hypnosis will not render a defendant's testimony inadmissible because of "the fundamental right of an accused to testify in his own behalf," that dicta was criticized both by the dissenting opinion in that case[40/] and by the concurring opinion in People v. Williams, supra, 132 Cal.App.3d 920, 928 (1982), a case decided shortly after Shirley. As noted by the dissenter in Shirley, ". . . if the majority opinion is correct, then the exception which the opinion establishes for previously hypnotized defendants who wish to testify is insupportable.

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40. Dissenting opinion at 31 Cal.3d, page 77.

Whether the right to testify in one's defense is fundamental . . . or constitutional . . . there can be no right to offer testimony which suffers from all of the potential vices which have triggered the majority's total ban on the testimony of hypnotized witnesses." As noted by the concurring opinion in Williams, "The idea that the predator may testify and yet his victim may not offends my sense of justice."

The majority opinion in Shirley relied primarily on the Frye rule, which conditions the admissibility of evidence based on a new scientific method of proof on a showing that the technique has been generally accepted as reliable in the scientific community in which it was

developed.41/ That the majority opinion did not think its "defendant exception" through is evidenced by the fact that the Frye rule has often been used against the defendant as well as against the prosecution.42/

Because defendants have no constitutional right to be excused from evidentiary rules for witnesses generally, the trial court did not

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41. Frye v. United States, supra, 293 F. 1013 (D.C. Cir. 1923); People v. Shirley, supra, 31 Cal.3d at pages 34, 47, 51-52. Amicus notes that there is now a conflict in the federal courts as to the continued validity of the Frye rule. (Mustafa v. United States __U.S.__, 106 S.Ct. 444 (Brennan, White, J. J. dis.)(1986).)

42. See People v. Hangsleben, supra, cited in Shirley at 31 Cal.3d, pages 34-35; see also Jones v State, supra, cited in Shirley at 31 Cal.3d, page 35; see also Wilcutt v. State 123 So.2d 763, 764 (Ala. 1971), and Johnson v. State 248 So.2d 763, 764 (Ala. 1971), both following the general rule barring defendants from introducing the results of lie detector tests.

deprive defendant of her right to due process under the Fourteenth Amendment insofar as it properly applied the rules of evidence to restrict her testimony to matters recalled before her hypnotic session.

CONCLUSION

For the foregoing reasons, amicus respectfully requests that petitioner's conviction be affirmed.

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